TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 549

VETO GIORDENELLO, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 5, 1957
CERTIORARI GRANTED OCTOBER 14, 1957

SUPREME COURT OF THE UNITED STATES

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No. 549

VETO GIORDENELLO, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fols. 1-4]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOLDING SESSIONS AT HOUSTON

No. 12,798 Criminal

UNITED STATES OF AMERICA

VS

VETO GIORDENELLO

CAPTION

Be it remembered: That in the above entitled and numbered cause, lately pending in said Court, in which Final *Judgment and Sentence* was rendered at the Regular *February*, 1956 Term of said Court, to-wit; On the *9th* day of *March*, A.D. 1956, the Honorable *Allen B. Hannay*, Judge of the United States District Court for the Southern District of Texas, presiding, the following proceedings were had, to-wit:

[fol. 5] IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

INDICTMENT—Filed February 8, 1956

The Grand Jury Charges:

Count One

On or about the 27th day of January, 1956, within the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court, one Veto Giordenello did unlawfully, knowingly, and feloniously purchase and have in his possession, a narcotic drug, to-wit: 5 ounces heroin hydrochloride, more or less, which said narcotic drug was purchased by the said Veto Giordenello not in or from the original stamped package and did not have attached thereto the appropriate tax-paid stamps, as required by law. (Vio. Sec. 4704, Tit. 26, USCA).

Count Two

That one Veto Giordenello hereinafter called defendant, on or about the 27th day of January, 1956, within the Houston Division of the Southern District of Texas, and within the jurisdiction of this Court, did transfer, sell and facilitate the transportation and concealment of, after importation, a narcotic drug; to-wit: 80 grains of heroin hydrochloride, more or less, which said defendant then and [fol. 6] there well knew to have been imported into the United States contrary to law. (Vio. Sec. 174, Tit. 21, USCA)

(S) T. J. Fusan, Foreman of the Grand Jury.
(S) C. Anthony Friloux, Jr., Assistant United States Attorney.

CAF:lh

In United States District Court

Motion to Suppress Evidence—Filed February 29, 1956

To the Honorable Judge of the Court, aforesaid:

Now into Court comes the defendant in the above styled and number cause and files this his motion to suppress the evidence illegally and unlawfully obtained in the above cause for the following reasons, to-wit:

I

This defendant moves the Court to suppress the evidence of the witnesses Mr. Tom Fendley, an officer of the Bureau of Narcotics of the United States of America and the officer and officers acting in consort with Mr. Fendley on the 27th day of January, 1956, in Harris County, Texas, when said officers unlawfully and illegally searched this defendant. [fol. 7] That said officers will upon a trial of this cause *will* testify to the result of said unauthorized search, the evidenced thus obtained being material to and the basis for the prosecution of this cause. That defendant at the time and place in question had the proprietary possession and ownership of 1 paper bag the contents of which is the

basis of this prosecution. This sentence added in long-hand.

II

For further cause this defendant says that he was searched about his person, papers and effects without a search warrant and without cause.

III

That the evidence obtained by said search in the manner aforesaid was obtained contrary to the laws and constitution of the United States of America.

Wherefore defendant prays that this Honorable Court will suppress the evidence of the witness and witnesses in this cause for the reasons herein set forth and that an order be entered in this cause in compliance with this motion.

(S) Veto Giordenello, Defendant.

(As to the amended part of motion:

3/2/56 (S) Veto Giordenello)

[fol. 8] *Duly sworn to by Veto Giordenello, jurat omitted in printing*

Certificate of Service (omitted in printing)

In United States District Court

[fol. 9] Statement of the Clerk Re Answer of the United States to Motion To Suppress Evidence.

Appellant has designated as a part of the Record on Appeal, "Answer of the United States to Motion to Suppress Evidence". However, it appears from the Clerk's records that no such answer was filed.

V. Bailey Thomas, Clerk. By (S) W. Paul Harriss, Deputy.

[fol. 10] IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

Criminal No. 12,798

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

VETO GIORDENELLO, Defendant.

Reporter's Transcript of Proceedings Had on March 2, 1956, in Connection with Defendant's Motion to Suppress

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Reporter's Certificate to Following Transcript omitted in printing.

[fol. 11] APPEARANCES:

The Honorable Allen B. Hannay, Judge, Presiding

C. Anthony Friloux, Jr., Esq., Assistant United States Attorney, Southern District of Texas, Houston, Texas. L. Glen Kratochvil, Esq., Assistant United States Attorney, Southern District of Texas, Houston, Texas, For the Government.

William H. Scott, Sr., Esq., Commerce Building, Houston, Texas. Clyde W. Woody, Esq., 2501 Crawford Street, Houston, Texas, For the Defendant.

[fol. 12] Afternoon Session—March 2nd, 1956

COLLOQUY BETWEEN COURT AND COUNSEL RE. AMENDMENT TO MOTION TO SUPPRESS EVIDENCE

The Court: Please be seated, everyone.

Let me see. The matter today is a matter of a motion, isn't it?

Mr. Scott: Yes, sir.

The Court: Shall I just read it?

Mr. Scott: If the Court please, there was an amendment that I wanted to make, under the rules, to the motion at this time.

The Court: Let me read the original then, and then you tell me what it is. Just have a seat.

All right, I have read the original motion, which was filed on the 29th day of February, 1956. What else did you have?

Mr. Scott: I would like to amend it, either by interlineation, or by dictating to the reporter, as the Court might approve, or have the defendant reswear to that section, and I want to set out that at the time and place in question of the alleged illegal search and alleged illegal arrest, if any, that the defendant had in his possession at that time a paper sack, the contents of which is the basis of this suit, or this styled and numbered cause, to make it more explicit, showing a proprietary interest in the ob-
[fol. 13] ject he had in his hand at the time.

The Court: Was that all?

Mr. Scott: Yes, sir.

The Court: Mr. Friloux, what is your idea on that?

Mr. Friloux: Well, Your Honor, we are ready to go forward here on the motion. Until the amendment, we felt that there were pleadings here that stated no valid ground on the motion for suppression. I believe the amendment of the motion meets the rule now, requiring a proprietary interest, although the wording is rather dubious. We still feel that the rule requires acknowledgment of ownership of the object, and unless that is so stated, of course, we will resist any hearing under Rule 41-E.

The Court: Well, let's make it a little bit simpler. Do you have any objection to the amendment being sworn to and filed at this time, and then we will hear from you with reference to whether you are ready to proceed on the amendment as it then exists?

Mr. Friloux: No, sir.

The Court: Well, if you don't have any objection, then you may make your interlineation.

Mr. Friloux: I have no objection, Your Honor, in the interest of time.

[fol. 14] The Court: Then have it sworn to by the defendant.

Mr. Scott: Mr. McAtee, will you—well, you don't write longhand though, do you?

The Official Reporter: Very little, sir.

Mr. Scott: (Making interlineation in motion to suppress.)

Mr. Friloux: Your Honor, Mr. Kratochvil was to sit with me, but he is on the long distance phone. He will be here in just a moment.

The Court: All right. It will be probably a minute or so anyway.

Mr. Friloux: All right, sir.

Mr. Scott: Veto, come around here, please.

(Thereupon the defendant swore to the amended motion to suppress, before the Clerk of the court.)

The Clerk: Your Honor, Mr. Scott has now put in, in ink,——

The Court: Read it to me.

The Clerk: ——in the first paragraph, beginning after the word, "because"—"The defendant at the time and place in question had the proprietary possession of ownership of one paper bag, the contents of which is the basis of this prosecution," and then Mr. Scott wrote in Roman [fol. 15] numeral number two after that, for the second paragraph.

The Court: Well, to make it clear-cut as well as clear, he is claiming the bag but not the contents of it, is that right?

Mr. Scott: He did not know what the contents were.

The Court: Well, that is a matter of development.

Mr. Scott: Yes, sir.

The Court: Do you swear to that?

The Defendant: Yes, sir.

The Clerk: Do you solemnly swear that the amended motion put in by Mr. William H. Scott, Sr., your attorney, is true and correct, so help you God?

The Defendant: I do.

The Court: All right, are you ready on the motion?

Mr. Scott: May I have him sign this, Your Honor?

The Court: Oh, yes.

(Thereupon the defendant signed the motion as amended, following which the Clerk placed a jurat thereon in longhand.)

The Court: All right, go ahead, gentlemen. All of the witnesses in this matter please stand, raise your right hands and be sworn, all of the witnesses.

[fol. 16] (Thereupon one witness was sworn by the Clerk)

Mr. Friloux: Your Honor, before proceeding, there are two other officers present that I do not contemplate using as witnesses, but there is a possibility, pending the developments, that they may be used in rebuttal, but they are present somewhere out in the hall. Do you want them sworn now as primary witnesses?

The Court: If you don't intend to use them, it is not necessary.

Mr. Friloux: They will be out of the courtroom, Your Honor.

The Court: So if you decide to use them, they will be outside. All right.

I believe you have the laboring oar, Mr. Scott.

Mr. Scott: Shall I proceed?

The Court: Yes.

Mr. Scott: If the Court please, I want to introduce in evidence from the record of this case the proceedings before the United States Commissioner had on the 26th day of January, 1956, with the filing of a complaint without listing any witnesses, made by Mr. William T. Finley, narcotic agent, and for the purpose of identifying it here, I identify [fol. 17] it, and just leave it, since it is papers of the court, court papers.

The Court: Suppose you read it?

Mr. Scott: "That on January 26th, complaint was filed by William T. Finley against Veto, V-I-T-O, Giordenello G-I-O-D-A-N-I-L-L-O," and that is scratched out, and I will explain that later to the Court; it was changed later to "V-E-T-O G-I-O-R-D-E-N-E-L-L-O."

The Court: All right.

Mr. Scott: The original of which is with the United States Commissioner, Mr. William Costa, at Houston, Texas. The copy I have is the papers filed with the Clerk in this case, pursuant to——

The Official Reporter: Please have the Clerk mark it, Mr. Scott.

The Clerk: Defendant's Exhibit No. 1.

Mr. Scott: Yes, sir.

The Clerk: "Duplicate copy of record of proceedings in criminal cases."

Mr. Scott: Being case number 87.

(Thereupon the instrument above described was marked for identification by the Clerk, and same is, in words and figures, as follows:)

[fol. 18] DEFENDANT'S EXHIBIT NO. "1"

UNITED STATES COMMISSIONER, SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Record of Proceedings in Criminal Cases

Before: William H. Costa, (Name of commissioner) Houston, Texas. (Address)

Commissioner's Docket No. 1. Case No. 87

THE UNITED STATES

VS.

VETO GIORDENELLO
~~VITO GIODANILLO~~

Complaint filed on Jan. 26, 1956, by Wm. T. Finley, official title, Narcotic Agent, charging violation of United States Code, Title 21, Section 174, on Jan. 26, 1956, at Houston, Texas in the Houston division of the Southern district of Texas as follows: Did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrachloride with knowledge of unlawful importation.

(Here insert brief summary of facts constituting offense charged.)

Warrants or Summons Issued:

Date January 26, 1956 Warrant/~~Summons~~ for ~~VITO GIODANILLO~~ VETO GIORDENELLO (name of defendant) to (name and title of officer) U. S. Marshal or any other authorized officer.

Substance of return: Returned & Executed on Jan. 28, 1956 by arresting def.

Date: —— ——. Warrant/Summons for —— —— to (name and title of officer) —— ——.

Substance of return: —— ——.

[fol. 19] Proceedings on First Presentation of Accused to Commissioner:

Date: January 27, 1956. Arrested by Wm. T. Finley, Nar. Ag.

On warrant of Wm. H. Costa, ~~without warrant~~.

Appearances:

For United States, William Thomas Finley, Nar. Ag., Houston, Texas.

For accused, 1/28/56: John R. Francis (atty.), Houston, Texas.

Proceedings taken January 26, 1956: Complaint & Warrant of Arrest issued. January 28, 1956: Def. appeared with counsel, advised of his rights & warned. Waived preliminary examination and was arraigned.

Outcome: Held for action for the U. S. District Court.

Bail fixed January 28, 1956. Amount, $25,000.00. Bonded —— ——, 19——, by cash deposited by (name) —— ——, Address ——, transmitted to clerk of district court —— ——, 19——, (or) by surety (name) —— ——, Address —— ——, (name) —— ——, Address —— ——, justified by affidavit dated —— ——, 19——, (or) committed to U. S. Marshal on January 28, 1956.

(Back side.)

Subpoenas for Witnesses issued:

—— ——, 19——, for (name of witness) —— ——, at request of (name of party) —— ——.

Substance of return —— ——, 19——, for (name of wit-
[fol. 20] ness).

Substance of return —— ——, 19——, for (name of witness) —— ——, at request of (name of party) —— ——.

Substance of return —— ——, 19——, for (name of witness) —— ——, at request of (name of party) —— ——.

Substance of return —— ——, 19——, for (name of witness) —— ——, at request of (name of party) —— ——.

Preliminary Examination:

(Not to be used if case was disposed of at first presentation.)

Date: —— ——, Appearances for—

United States (name) —— ——, (address) —— ——.

Accused (name) —— ——, (address) —— ——.

Witnesses for United States: —— ——, —— ——, —— ——, —— ——.

Witnesses for Accused: —— ——, —— ——, —— ——, —— ——.

Witness payroll containing —— names certified to United States Marshal for payment, 19——.

Proceedings taken —— ——.

Outcome —— ——.

Bail fixed —— ——, 19——. Amount, $——.

Bonded —— ——, 19——, by cash deposited by (name) —— ——, address —— ——, transmitted to clerk of district [fol. 21] court —— ——, 19——, (or) by surety (names) —— ——, address —— —— and —— ——, address —— ——, who justified by affidavit —— ——, 19——. Committed to —— —— on —— ——, 19——. Certified to be a correct transcript.

Made this 31st day of January, 1956.

Transmitted to Clerk of United States District Court for the Southern district of Texas, January 31, 1956.

(S.) William H. Costa, United States Commissioner.

OFFERS IN EVIDENCE

Mr. Scott: Then I offer in evidence before the Court a warrant of arrest issued out of Commissioner's Docket No. 1, Case Number 87, United States versus V-I-T-O G-I-O-D-A-N-I-L-L-O, together with return of the United States Marshal dated January 26, 1956, and the return, "Received January 28th, 1956, at Houston, Texas, and executing by arrest of Veto, V-E-T-O G-I-O-R-D-E-N-E-L-L-O, at Houston, Texas, on January 28th, 1956. James W. McCarty, United States Marshal, Southern District of Texas, by Kathryn M. Matthews, Deputy.

[fol. 22] The Clerk: Defendant's Exhibit No. 2.
Mr. Scott: Yes, sir.
The Clerk: Warrant of arrest.

(Thereupon the instrument above referred to was marked for identification by the Clerk, and same is, in words and figures, as follows:)

Commissioner's warrant of arrest.

DEFENDANT'S EXHIBIT NO. "2"

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Commissioner's Docket No. 1. Case No. 87

UNITED STATES OF AMERICA

v.

VETO GIORDENELLO
~~VITO GIODANILLO~~. V. G.

Warrant of Arrest

To *U. S. Marshal or any other authorized officer:*

You are hereby commanded to arrest ~~VITO GIODANILLO~~, V. G., VETO GIORDENELLO and bring him forthwith before the nearest available United States Commissioner to answer to a complaint charging him with re-
[fol. 23] ceiving, concealing, etc., narcotic drugs, to-wit: heroin hydrachloride with knowledge of unlawful importation in violation of U.S.C. Title, 21, Section 174.

Date January 26, 1956.

(S.) William H. Costa, United States Commissioner.
(Seal.)

RETURN

Received January 28, 1956 at Houston, Texas, and executed by arrest of Veto Giordenello at Houston, Texas on Jan. 28, 1956.

James W. McCarty, United States Marshal, Southern District of Texas. By (S.) Kathryn M. Matthews, Deputy.

Date —— ——, 19—.

OFFER IN EVIDENCE

Mr. Scott: Then I offer, may it please the Court, the original complaint filed before the United States Commissioner on Docket Number 1, Case Number 87, United States of America versus V-I-T-O G-I-O-D-A-N-E-L-L-O, which has been marked out and the name, "V-E-T-O G-I-O-R-D-E-N-E-L-L-O," with the initials, "V G", being the defendant's initials, "Before me, William H. Costa, Houston, [fol. 24] Texas, the undersigned complainant being duly sworn states: That on or about January 26, 1956, at Houston, Texas, in the Southern District of Texas, V-I-T-O G-I-O-D-A-N-E-L-L-O," and that is X'd out, and "V-E-T-O G-I-O-R-D-E-N-E-L-L-O" is put in, "did receive, conceal, and so forth, narcotic drugs, to-wit: heroin hydrachloride with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code," and it shows that "blank" are material witnesses, and that is signed and sworn to by or before William H. Costa, United States Commissioner.

We offer that as Defendant's Exhibit No. 3.

The Clerk: Defendant's Exhibit No. 3, the complaint for violation.

(Thereupon the instrument above described was marked for identification by the Clerk, and same is, in words and figures, as follows:)

DEFENDANT'S EXHIBIT No. 3

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Commissioner's Docket No. 1. Case No. 87

[fol. 25] Complaint for Violation of U.S.C. Title 21. Section 174

UNITED STATES OF AMERICA

v.

VETO GIORDENELLO
~~VITO GIODANILLO~~. V. G.

Before William H. Costa, Houston, Texas. The undersigned complainant being duly sworn states: That on or about January 26, 1956, at Houston, Texas in the Southern District of Texas, VETO GIORDENELLO, ~~VITO GIODANILLO~~, V. G., did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrachloride with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code.

And the complainant further states that he believes that —— —— are material witnesses in relation to this charge.

(S.) Wm. Thomas Finley, Narcotic Agent.

Sworn to before me, and subscribed in my presence, January 26, 1956.

(S.) William H. Costa, United States Commissioner.
(Seal.)

[fol. 26] Mr. Scott: I am trying to eliminate something here, Your Honor.

At the time of the arraignment on January 28th, in each of the exhibits appears, one, two and three, where the name appears as V-I-T-O G-I-O-D-A-N-I-L-L-O, it was changed

to V-E-T-O G-I-O-R-D-E-N-E-L-L-O, and I will further state for the Court to further clarify it that at the time they were changed, the defendant was present with his attorney, and he initialled that change.

Mr. Finley, would you take the stand?

Mr. Friloux: Your Honor, preparatory to questioning this witness, we object to any further proceeding, and we feel the stipulation in the motion that is before this Court is still not within the ruling required under the Fourth Amendment, and the suppression motion now shows that they acknowledge possession or ownership of the bag, but not ownership of the contents of the bag, and I don't believe that, until that issue of ownership and possession is adequately cured, that we can go forward into the merits of the arrest, and so forth, because until such time as that question is settled, then it is just a fishing expedition, I think.

I know there is a late case of Lovett versus U.S. just out [fol. 27] of the Fifth Circuit which I think the Court is aware of that states the law on that point, and which states this: no point of law is more firmly settled than that,

"The guarantee of the Fourth Amendment against unreasonable searches and seizures is personal and can be raised only by one who, at the least, claims ownership or possession of, or connection with the premises searched or property seized and defendant who denied any interest in property searched and seized was not entitled to motion to suppress evidence thereby obtained."

Until such time as that is clearly stated or shown that the property seized was in possession of or ownership of this man, we object to any further procedure. The law is also clear there is no standing to be heard.

Mr. Scott: He raises that question by his sworn motion, may it please the Court.

Mr. Friloux: It is merely an allegation and no proof, and I think there is a legion of cases to that effect.

The Court: I will hear him, subject to your motion.

Mr. Friloux: All right, sir.

The Court: Who will you call first?

Mr. Scott: Mr. Finley, please.

[fol. 28] WILLIAM THOMAS FINLEY, being called as a witness by the defendant in support of his motion to suppress, having been first duly sworn on oath, testified as follows:

Direct examination.

Q. (By Mr. Scott) Please state your name, sir.

A. William Thomas Finley.

Q. Mr. Finley, what official position do you hold for the United States Government?

A. I am an enforcement agent for the United States Treasury Department, Federal Bureau of Narcotics.

Q. You held that position on the 26th day of January, 1956, and prior thereto?

A. I did, sir.

Q. You are the same William T. Finley who signed the complaint for violation of the U. S. Code, Title 21, Section 174, against a man named V-I-T-O G-I-O-D-A-N-I-L-L-O?

A. I am.

Q. And I exhibit to you now Defendant's Exhibit No. 3. That is your signature?

A. It is, yes, sir.

Q. I notice, Mr. Finley, that on the complaint for violation, you do not list any witnesses.

A. Yes, sir.

[fol. 29] Q. Now, did you, of your own knowledge at the time you made this complaint, know that one V-I-T-O G-I-O-D-A-N-I-L-L-O had in his possession any heroin hydrochloride?

A. That V-I-T-O G-I-O-D-A-N-I-L-L-O that you spelled there, is the same—if the answer to that is "yes"—then that is the same as the defendant V-E-T-O G-I-O-R-D-E-N-E-L-L-O.

Mr. Scott: Just a minute, Mr. Finley.

Your Honor, I move that the answer be stricken as not responsive to the question.

The Court: Overruled.

Q. (By Mr. Scott) I said, of your own knowledge did you know at the time you made this affidavit that V-I-T-O G-I-O-D-A-N-E-L-L-O had received and concealed heroin hydrochloride?

A. To reiterate my answer, if the Veto Giordenello, G-I-O-R-D-E-N-E-L-L-O, that is your client, that you are referring to, I had probable cause to believe that, yes.

Mr. Scott: That is a conclusion. I move that it be stricken.

The Court: Overrule your objection.

Q. (By Mr. Scott) Did you have any knowledge of your own, had you seen him, or did you know of his receiving and concealing heroin hydrochloride, you, yourself?

[fol. 30] A. Had I received any?

Q. Yes.

A. From Veto Giordenello?

Q. Yes.

A. Had I received——

Q. Had you seen him receive or conceal any heroin hydrochloride?

A. No, sir.

Q. Then the complaint for violating that you signed was not made on information or upon facts, I mean upon facts known to you, or to your personal knowledge?

Mr. Friloux: That sounds a little argumentative with his own witness. I ask him to rephrase the question.

Q. (By Mr. Scott) Of your personal knowledge did you know, in fact, that Veto Giordenello received or concealed heroin hydrochloride?

A. I believed that I did, yes.

Q. I said of your own knowledge.

A. My own knowledge, meaning information?

Q. No, sir, I am not talking about that. I am talking about what you, yourself, know.

A. Well, my knowledge was based upon my information.

Q. I will get to that in the next question. Of your own personal knowledge you didn't know any facts, did you?

[fol. 31] Mr. Friloux: Your Honor, I am going to object to him leading his witness and giving him a double-barreled question on top of that.

Q. (By Mr. Scott) From this——

The Court: Reframe your question.

Mr. Scott: I am speaking of what you knew, what you had seen, heard, or arrived at by your senses.

The Court: Yes, that is all right.

A. I had heard and arrived at by my senses——

Mr. Scott: I don't mean——

Mr. Friloux: I object, counsel. Let the man answer the question.

The Court: Let him answer it. Don't interrupt him until he has finished his answer. I do not permit that in this court.

Mr. Scott: Excuse me, but I don't think I made my question clear to him.

The Court: Nevertheless, let him answer it, and then if you want to make a motion to strike, you have that privilege.

Mr. Scott: I would like to withdraw my question.

The Court: I am not going to let you. I will let him finish his answer. I do not tolerate that type of interrogation by any lawyer in this court.

[fol. 32] Mr. Scott: Yes, sir.

The Court: Read him, Mr. Reporter, the question and the answer as far as he had gone before he was interrupted by counsel.

The Official Reporter (Reading): "Question: I am speaking of what you knew, what you had seen, heard or arrived at by your senses.

"Answer: I had heard and arrived at by my senses——"

The Court: All right, finish your answer.

A. —the information upon which the probable cause is based.

Q. (By Mr. Scott) Yes, sir. Excuse me, Mr. Finley. What I meant to ask you was had you seen with your senses Veto Giordenello do anything with reference to receiving and concealing the narcotic drugs, to-wit: heroin hydrochloride?

A. I don't mean to be argumentative, Mr. Scott, but I had seen him by my senses, you say, I had heard—I hadn't seen with my eyes, but that was the previous question.

Q. Yes.

A. I hadn't seen Giordenello with narcotics in his possession, no.

Q. Then this affidavit you made was based on what some-

[fol. 33] one had told you?

A. Not entirely, no, sir.

Q. Well, now——

A. The information that I received was not based entirely upon what I was told. I had maintained surveillance upon Giordenello. I had received information from more

than two sources whereby it would indicate that Giordenello was in possession of the heroin at the time that I swore to it.

Q. All right. Yes, sir. Now, that information was from informants?

A. Not entirely, no, sir.

Q. Well, were those people available, Mr. Finley, to have signed the complaint?

A. Which people are you talking about?

Q. The people other than informers? You said people other than informers had given you information. Were they available to have signed the complaint for violation of U. S. Code Title 21, Section 174?

A. By "available", what do you mean?

Q. Well, could they be taken before the Commissioner, or could you have obtained affidavits to be filed with the Commissioner?

A. I swore to the complaint myself on the basis of their information.

[fol. 34] Q. Yes, sir, and that is the only reason that you swore to it, was on the basis of the information given you?

A. No, sir, not entirely. I had kept a surveillance on this man beginning the latter days of December, as I said before, and was in possession of information which corroborated my surveillance, and vice versa my surveillance corroborated my information that he was in Houston, and planned to go to Chicago, Illinois, to bring back a large supply of heroin, and he did leave, and he did return, and my surveillance did corroborate that information. In addition to that, I received information from other law enforcement officers that he was in town with that large quantity of heroin.

Q. Now, Mr. Finley, my question was, outside of the informers, were the people who knew the facts set forth in the complaint for violation of Section 174, Title 21, did they live in Houston, or were they available to have been taken before the United States Commissioner, or for you to have obtained affidavits from them to be filed with the United States Commissioner?

Mr. Friloux: I will object first. It asks three questions at one time. If he will break it up——

The Court: You had better cut it down. It is a three-way compound question.

[fol. 35] Q. (By Mr. Scott) First were the people that gave you the information other than informers?

A. Yes, sir, they were.

Q. Were they residents of Houston, Harris County, Texas?

A. I believe they are, yes, sir.

Q. The next question, were they available on the 26th day of January, where they could have been taken before the United States Commissioner?

A. I don't know whether they were or not at that particular time.

Q. Did you attempt to find out?

A. Well, it didn't enter my mind whether they were available to swear before the Commissioner or not.

Q. Did you make any attempt to locate them to take them before the Commissioner?

A. Not for that purpose, no, sir.

Q. Did you obtain any affidavits from them to be filed with the United States Commissioner?

A. No, sir.

Q. Mr. Finley, you did not at any time obtain a search warrant to search the premises or the person of Veto Giordenello, did you?

A. The premises or the person?

Q. Yes.

[fol. 36] A. No, I didn't get a search warrant, no.

Q. You were in possession of the facts as you have related them, as you have told us, on the 26th day of January, weren't you?

A. I was, yes, sir.

Q. And on the 27th day of January?

A. I was.

Q. You arrested Veto Giordenello on the 27th day of January, did you?

A. Yes, sir, I did.

Q. You didn't have a search warrant?

A. A search warrant, no, sir.

Q. Did you have in your possession at that time to exhibit to the defendant a warrant of arrest?

A. I did.

Q. Did you execute that warrant of arrest?

A. I did.

Q. Did you make the return to the United States Commissioner in this court of the warrant of arrest as executed by you?

A. I gave it back to the United States Commissioner, yes.

Q. You didn't make a return on it?

A. By return, I gave it back to the Commissioner after I had executed it.

[fol. 37] Q. Did you report it into court? I mean this is not your——

Mr. Friloux: Your Honor, I object to this line of interrogation, the way counsel is first telling the witness what he wants him to say. He is leading him, and this is his witness, however adverse the proceeding might be, and I would like for the Court to remind counsel, however learned in years he may be, to refrain from doing that.

The Court: Hurry along. Make your objection.

Q. (By Mr. Scott) All right. I show you Exhibit No. 2, which is a warrant of arrest. The return shows it was executed by the United States Commissioner on the 28th day of January, 1956. I will ask you if you executed another warrant of arrest other than the one I show you that was executed by the United States Marshal.

A. Well, I have no identifying marks on this warrant to show me that it is the warrant I gave back to the Commissioner. I gave a warrant back to the Commissioner.

Q. Well, if you executed a warrant of arrest, you would make your return on it, wouldn't you?

A. To the United States Commissioner, yes.

Q. Did you make one?

Mr. Friloux: Your Honor, first I don't think we are [fol. 38] arguing legal terms, execution and return, and I don't think this officer understands the terms.

The Court: Did you return it to him, whether or not you did any writing on it or not? I think that is the question he is asking you. Did you write on it, or return it without writing on it?

A. I returned it to the Commissioner.

The Court: Without writing on it?

A. Without writing on it, yes, sir.

The Court: Go ahead.

Q. (By Mr. Scott) You don't know whether this Exhibit 2 is the warrant you had or not?

A. I don't know that now, no, sir.

Q. Mr. Finley, on the 27th day of January, you saw the defendant at his home, or near his home, at 2901 Airline Drive, didn't you?

Mr. Friloux: I object to his leading questions.

The Court: All right, don't lead the witness.

Q. (By Mr. Scott) All right, did you see the defendant on the 27th day of January, 1956?

A. I did, yes, sir.

Q. What time of day?

A. At about 6:00 p.m.

Q. At what place?

A. In the area of 2901 Airline Drive, Houston, Texas.

[fol. 39] Q. What was he doing out there?

A. He returned to his home there in his car.

Q. Did you have the warrant of arrest then?

A. I did.

Q. Did you execute it?

A. Later I did, yes, sir.

Q. Answer, did you execute it when you saw him?

A. When I first saw him?

Q. Yes.

A. No, sir.

Q. Was there anything to keep you from placing him under arrest at that time?

A. I felt so, yes, sir.

Q. He was present in the area of 2901 Airline, and you were present there?

A. Yes, sir.

Q. No one kept you from executing your warrant of arrest, did they?

A. I kept myself from it.

Q. Yes, sir. Then, Mr. Finley, you say you kept yourself from executing the warrant of arrest. Let me ask you this question: wasn't it your intention to execute the warrant of arrest so you would have the opportunity to search the defendant?

A. I beg your pardon. Would you repeat that?

[fol. 40] Q. Wasn't it your object—you could have placed him under arrest there at 2901 Airline, couldn't you?

A. I had the warrant, yes.

Q. You could have?

A. Yes.

Q. Wasn't it your purpose in not placing him under arrest then to later, at some future time, either later that night or that day, to serve that warrant so you could search the defendant?

A. No, sir, that was not the purpose for my waiting to execute the warrant. This was an investigative technique on my own. It was a decision I made myself.

Q. Do I understand by that that the whole procedure was an investigative technique by you?

A. No, not the whole procedure; no, the execution of this warrant was. The investigation, as I have stated before, started before Christmas on Veto Giordenello, and there wasn't any particular reason to arrest the man at any particular moment or time after getting the warrant.

Q. Well, from the time of the investigation up until the time you arrested him, you, yourself, never did see him do anything wrong, did you?

A. I wouldn't say that, no, sir. I couldn't answer no to that question.

[fol. 41] Q. I mean violate any of the U. S. laws.

A. Well, that is a difficult question to answer. I wish you would rephrase it, or reword it, if you possibly can, so I can better understand it.

Q. Well, it is not my attempt to trap you in any question. I say from the time the investigation began until the 27th or 26th day of January, you never saw Veto Giordenello violate any of the laws of the United States of America, did you?

A. Not that I am prepared to prove now, no, sir.

Q. Yes, sir, and you didn't see him on the 26th, prior to the time that you swore out that first warrant, did you?

A. I beg your pardon, sir?

Q. You hadn't seen him violate any law at the time you swore out the first warrant on January 26th, had you?

A. That is the same answer. I can't say no to that question.

Q. But I am speaking of your knowledge, Mr. Finley.

A. Well, of my own knowledge I would say that the answer to your question is no, or rather it is undetermined. It is not no, and it is not yes, that I am prepared to prove or state now.

[fol. 42] Q. Did you see him on the 26th at all?

A. Yes, sir.

Q. And you could have served the warrant then on the 26th, couldn't you?

A. Well, the warrant was issued on the 26th, it was effective on the 26th, and I saw him after the warrant was issued.

Q. Yes, sir.

A. And it was effective, so I could have served it I suppose.

Q. Yes, sir, and you didn't arrest him then?

A. No, sir, I didn't.

Q. And you had the warrant?

A. Yes, sir.

Q. Now, Mr. Finley, weren't you just keeping that warrant so that you would have the excuse to search him at the time you executed the warrant?

A. No, sir, I didn't get the warrant for that purpose.

Q. Wasn't that your purpose?

A. No, sir, it was not.

Q. Well, at the time you did arrest him on the 27th, you hadn't seen him violate the law before you served the warrant, had you?

A. That is the same question again, Mr. Scott. I can't say whether I did or didn't at this time.

[fol. 43] Q. I will ask you the question this way: you went out in the vicinity of Lathrop and Brownsville Streets, didn't you?

A. On the 27th day of January, 1956, yes, sir.

Q. And you parked at or near a grocery store across the street from a house——

Mr. Friloux: Your Honor, I hate to object or to be picayunish, but this is straight across the board leading in every statement counsel asks of the witness, and I would like to ask him to rephrase his question properly.

Q. (By Mr. Scott) Well, on the——

Mr. Friloux: I will object to it for that reason, Your Honor.

Mr. Scott: Excuse me.

The Court: Go ahead.

Q. (By Mr. Scott) On the evening of January 27th, 1956, did you go out in the vicinity of Brownsville and Lathrop Streets?

A. I did, yes, sir.

Q. Were you in an automobile there?

A. Yes, sir.

Q. Did you park your car?

A. I did, sir.

Q. Where?

[fol. 44] A. Just off of the intersection of Brownsville and Lathrop. I believe it is the northeast corner of that intersection.

Q. Did you see the defendant Veto Giordenello there?

A. I did, yes, sir.

Q. What was he doing?

A. Well, he was doing several things during the time that I saw him.

Q. What did you see him do prior to the time you——

A. I saw him drive his 1955 Cadillac; I saw him get out of that Cadillac; I saw him go into an address at 6827 Brownsville Street; I saw him come out of that address; I saw him go into a garage; I saw him come out of the garage——

Q. And then you executed the warrant of arrest, did you, that you had obtained on the 26th day of January?

A. As he attempted to approach his Cadillac, yes, sir.

Q. He was still in the yard, wasn't he?

A. I believe he was just at the end of the fence there.

Q. I will ask you if there was a garage there in the rear of the premises you have just described on Brownsville?

A. That is the one I saw him come out of.

[fol. 45] Q. Are there any doors on that garage?

A. Well, there are two—there is a front door and a door that the car would ordinarily go in.

Q. Yes, sir.

A. And a side door.

Q. With reference to the door that you saw the defendant at or by; was that the front or the side door?

A. Well, the side door, where a person would enter, a small doorway.

Q. I will ask you if there is a fence about the premises that you have described on Brownsville Street?

A. There is a fence.

Q. What type is it?

A. A metal fence.

Q. Do you know what they generally call those fences?

A. A link chain fence, or Cox fence, I believe, or something.

Q. Does that fence surround the side door of the garage?

A. I would reword your question in answering it, in that the side door of the garage is within the fence, yes, sir.

Q. That is what I meant.

[fol. 46] A. Yes, sir.

Q. I will ask you where you saw the defendant with reference to the side door of the garage?

A. I saw him enter that door and return from that door to the outside.

Q. And then you arrested him, did you?

A. Well, not at the door, no, sir.

Q. Where was he when you arrested him?

A. He left the area of the door, and as I say he was approaching the fence entrance, as he goes out towards the road, which would be Lathrop, I believe.

Q. I will ask you whether or not he had gotten outside of the fenced premises?

A. He was at the gateway. The gate was open, or there was no gate on it, but he was at the space there, he was just, I should say better, right alongside the gate, right at the outside of it.

Q. Did you have a warrant to search the premises that you have described on Brownsville Street?

A. I did not.

Mr. Scott: We rest, Your Honor.

Mr. Friloux: Do I understand that he rests prior to my having a chance at cross examination?

Mr. Scott: I mean that is all of the questions to this witness.

[fol. 47] The Court: Let's understand it. You mean you pass the witness, or that is all of the testimony you are offering?

Mr. Scott: May I ask one more question, Judge?

The Court: Answer my question first.

Mr. Scott: That will be all after one more question, all of the testimony we will offer by this witness.

The Court: From this one witness?

Mr. Scott: Yes, sir. May I ask another question?

The Court: Yes, sir.

Q. (By Mr. Scott) Mr. Finley, did the defendant have anything in his hand at the time you arrested him?

A. He had a substance which has been chemically analyzed and proven to be heroin hydrochloride to the amount of five ounces and some-odd grains.

Q. Did he have a paper sack in his hand?

A. This heroin hydrochloride was contained in the paper sack and other wrappings.

Q. He had a brown, or was it a brown paper sack?

A. Yes, sir, it was.

Q. That was in his hand?

A. It was, yes, sir.

Q. And what you are testifying about as to the substance that was in that sack?

[fol. 48] A. Yes, sir.

Mr. Scott: Yes, sir. We pass the witness, if the Court please.

Mr. Friloux: Pass the witness.

The Court: Stand aside. Call your next witness.

Mr. Scott: We rest, Your Honor.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Friloux: At this time, Your Honor, at the conclusion of the case in chief for the petitioner, the Government would move that the petition be disallowed, first on the grounds that this is a hearing primarily concerned with the validity of a warrant and based on probable cause.

The testimony by the witness, the only evidence which was brought in by the petitioner himself, shows that the warrant was issued, and the warrant itself is in evidence, and the act of the officer in getting the warrant has been brought out very clearly, that it was issued on probable cause and other activities.

Now, without further arguing, we move that the Court deny the petitioner's relief requested right now. We don't

feel that they have met the burden of showing any illegality, and there is no showing of the most basic element, that of possession. There is no affirmative evidence in the record that this man acknowledges possession or owner-
[fol. 49] ship of it. I don't believe that they can do it in the manner requested.

We therefore move the Court to disallow the petitioner's relief.

(Following argument by counsel for both sides the Court made the following announcement, and the following proceedings were had:)

The Court: All right, I will mark it submitted, and appear back in this court room with your client on Monday at 10:00 o'clock.

Mr. Scott: Yes, sir.

Mr. Friloux: Your Honor, in order to be sure I understand the proceedings, we have not formally rested.

The Court: Oh, well, I didn't understand that. If I am going to pass on this motion——

Mr. Friloux: I want to state to the Court that we have now, for the record here. I didn't make the statement in the record that I have rested.

The Court: Don't try it by piecemeal.

Mr. Friloux: No, sir.

The Court: If you have any evidence, let's go into it.

Mr. Friloux: No, sir, we are standing as is, but I wanted to be sure the record reflected it.

The Court: Yes, sir. I am sure it does.

[fol. 50] Mr. Friloux: Yes, sir.

The Court: Court will stand adjourned under the rule.

[fol. 51] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

Transcript of Proceedings—February 5, 1956

I, Howard J. Boland, deputy official shorthand reporter for the United States District Court for the Southern District of Texas, hereby certify that the following is a true and complete transcript of the proceedings had before His Honor, Allen B. Hannay, Judge of said Court, on the

5th day of February, 1956. Witness my official hand this 28th day of May, 1956.

Howard J. Boland, Substitute Official Reporter, United States District Court, Southern District of Texas.

[fol. 52] APPEARANCE:

James T. Dowd, Esq., Assistant United States Attorney, Houston, Texas. James E. Ross, Esq., Assistant United States Attorney, Houston, Texas, For the Government.

William H. Scott, Sr., Esq., Commerce Building, Houston, Texas. Clyde W. Woody, Esq., 2501 Crawford Street, Houston, Texas, For the Defendant.

[fol. 53] Morning Session—Feburary 5, 1956

DENIAL OF MOTION TO SUPPRESS EVIDENCE

The Court: Criminal Number 12, 798, United States of America versus Veto Giordenello. On the motion to suppress, motion to suppress is overruled.

Mr. Scott. Note our exception.

The Court: On the merits, 12,798, U.S.A. versus Veto Giordenello, what says the Government?

Mr. Dowd: Is the Court calling that as the first case on the docket to be tried?

The Court: Yes, sir.

Mr. Dowd: In that case, Your Honor, I would like to say we would not be ready until about 2:00 o'clock this afternoon.

The Court: We probably won't have a jury anyway. I don't believe we have enough for our situation this morning. I wanted an announcement.

Mr. Dowd: We will be ready by then.

The Court: Ready?

Mr. Scott: Yes, sir.

The Court: You may go until 2:00 o'clock, then.

[fol. 54] Afternoon Session—February 5, 1956

The Court: Cause No. 12,798, United States of America versus Veto Giordenello. What says the Government?

Mr. Dowd: The Government is ready, Your Honor. However, I would like to bring one matter up outside the panel. May we have the jury panel removed? Do you want the defendant here?

The Court: We had better have the defendant here.

All right, what is the matter?

MOTION THAT COUNT TWO OF INDICTMENT BE DISMISSED AND DISMISSAL THEREOF

Mr. Dowd: The Government would like to move and recommend that Count 2 be dismissed.

The Court: Count 2?

Mr. Dowd: Yes, sir.

The Court: Any objection?

Mr. Scott: In view of that announcement, Judge, we would waive a jury and like to be tried before the Court.

The Court: On Count 1?

Mr. Scott: Yes, sir. It is really a matter of protecting ourselves on that motion, and I think we could do it before the Court.

The Court: On Count 2, on the recommendation of the [fol. 55] district attorney, with the consent of the defendant and his counsel, Count 2 is dismissed. Is that agreeable with you, Mr. Giordennello?

Mr. Giordenello: Yes, sir.

Mr. Dowd: I would like to make the statement here that I have not discussed this at all with defendant's attorneys, this recommendation.

The Court: I am not interested. It is agreeable whether you have or have not discussed it with them. There is no question of a trade, is that what you mean?

Mr. Dowd: Yes, sir.

Mr. Scott: Yes, sir. Do you wish to accept the waiver of jury?

The Court: You have a copy of the waiver?

Mr. Scott: Yes, sir.

The Court: Do you have a waiver prepared?

Mr. Dowd: Yes, Your Honor.

The Court: Count 2 is dismissed.

Mr. Scott: I am just protecting my motion I made the other day.

The Court: That's an entirely different matter. You have preserved your record on that.

Mr. Scott: Yes, sir. But I couldn't waive it by admitting evidence now that would overcome it.

[fol. 56] The Court: You mean beginning trial without prejudice to your motion?

Mr. Scott: Yes, sir.

The Court: Well, you gave this morning notice of dissatisfaction and took exception to the ruling of the Court when that was announced. That is in the record likewise.

Mr. Scott: Yes, sir.

The Court: Both sides having announced ready for trial on Count 1, which is the only count left, we will proceed.

(Following signing of a waiver of jury, Mr. Dowd read Count 1 of the indictment.)

PLEA

The Court: To which the defendant as to Count 1 enters a plea of ——

Mr. Scott: Not guilty.

The Court: Not guilty. All right.

All witnesses in the Giordenello case will please stand, raise your right hand and be sworn.

The rule?

Mr. Scott: He is pleading not guilty without waiving the motion heretofore filed and the exception taken to the Court's ruling.

The Court: That's right.

Was the rule invoked or not?

[fol. 57] Mr. Scott: No, sir.

The Court: Call your first witness.

WILLIAM THOMAS FINLEY, a witness called on behalf of the Government, testified on his oath as follows:

Direct examination.

Q. (By Mr. Dowd) Will you state your name and occupation, please?

A. William Thomas Finley, enforcement agent for the Federal Bureau of Narcotics, U. S. Treasury.

Q. Where are you stationed, Mr. Finley?

A. Houston, Texas.

Q. Where do you live, sir?

A. In Houston, Texas.

Q. How long have you been with the Federal Narcotics Service?

A. Over four years, sir.

Q. Mr. Finley, do you know the defendant in this case, Veto Giordenello?

A. I do.

Q. Did you have occasion to see him on January 27, 1956?

A. I did.

Q. Would you relate to the Court, please, sir, the facts about your seeing him on that day?

[fol. 58] A. On January 26th—27th, rather, 1956, at about 5:30 p.m., I began to maintain surveillance over the residence of Veto Giordenello at 2901 Airline Drive, Houston, Texas.

At about 5:45 Veto Giordenello, driving his 1955 Cadillac, appeared at his home, drove into his home.

At about 7:15 p.m. Veto Giordenello came out of 2901 Airline Drive, Houston, Texas, and got into his 1955 Cadillac and proceeded to leave the area. My surveillance was maintained and I followed him to the intersection of Lathrop and Brownsville Streets, Houston, Texas, where I observed he parked his car, a '55 Cadillac——

The Court: If it isn't the same Cadillac—I have understood your three statements it was a 1955 Cadillac.

The Witness: The same automobile.

And got out of the car and entered 6827 Brownsville Street, Houston, Texas.

And he was in that house for approximately thirty minutes. I observed him to come out of the house, the rear entrance of this house, and to enter a garage, a one-car garage which was located to the rear of the property and of this house at 6827 Brownsville Street, Houston, Texas.

[fol. 59] Less than sixty seconds later he came out of the garage, before-described garage, and as he approached the area of the gateway in the fence that surrounds that property I placed him under arrest.

And in his possession——

Mr. Scott: If the Court please, we want to make the objections in our motion that any evidence he found at this time—as set out in our motion—that the warrant for arrest was based upon a complaint that was unfounded, and he did not have a search warrant at the time that he placed him under the alleged arrest.

In other words, I am just making my objection to protect the motion, if the Court please.

The Court: Go ahead.

Q. (By Mr. Dowd) Mr. Finley, at what time, approximately, was it when you placed the defendant here under arrest?

A. Approximately 8:00 p.m. on January 27, 1956.

Q. And exactly where did you place him under arrest? At what location?

A. On the property of 6827 Brownsville Street, Houston, Texas.

Q. Could you identify the defendant, please?

A. Veto Giordenello is the man in the dark brown suit [fol. 60] just to the rear of Attorney Woody.

Q. Now, at the time you started surveilling him or some house at 2901 Airline Road, Houston, Texas, were you alone?

A. I was not.

Q. Were you on duty at that time?

A. I was.

Q. Who was with you?

A. I was in the company of George D. Shelton, narcotic officer, Houston Police Department, Narcotics Division.

Q. And was *with* Mr. Shelton with you during the entire time you surveilled the house at 2901 Airline Road up until the time of the arrest?

A. Yes, he was.

Q. Now, Mr. Finley, when the defendant Giordenello went into the house at 6827 Brownsville Street, Houston, Texas, you say you watched there or observed for about thirty minutes, is that right?

A. Yes.

Q. Where were you located when you were observing?

A. Just across the street on Lathrop Street, on the doorstep, front doorstep of a grocery store which is lo-

cated on the corner of Brownsville and Lathrop just opposite 6827.

[fol. 61] (Thereupon two objects were marked for identification as Government's Exhibits 1-A and 1-B.)

Q. (By Mr. Dowd) Mr. Finley, I direct you attention to what has been marked as Government Exhibit 1-A, and ask you, sir, if that is a locked sealed envelope?

A. Yes, sir.

Q. And is it locked, sir?

A. It is.

Q. Will you please open that and examine it and tell us what you find?

A. Do you have a knife?

Q. Would you describe the contents of Exhibit 1-A?

A. There is a brown manila bag or sack and approximately six ounces of a substance, which I have initialed.

Q. When was the first time you saw this particular sack and the substance therein?

A. About 8:00 p.m. on January 27, 1956.

Q. And where did you first see it?

A. In the hands of Veto Giordenello.

Q. And where was he coming from when you saw that in his hand?

A. From the garage entrance to the rear of 6827 Brownsville Street, Houston, Texas.

Q. Now, would you look in the sack and tell me what, to the best of your recollection and knowledge, is in there?

[fol. 62] A. There are ninety-five bindles or papers which are approximately ten grains each of a substance wrapped in a Cellophane—each wrapped in a Cellophane individual wrapper, and a brown manila envelope which also contains a quantity of the substance.

Q. Now, how do you identify, Mr. Finley, the sack and the contents?

A. By my initials on each one of the bindles or papers in the brown manila envelope and brown paper sack.

Q. Describe specifically exactly what you saw from the first time you saw the defendant with that sack in his hand until you took it from him.

A. I saw this sack, brown paper sack, in the defendant's left hand, and inside were the contents that were

presently there, this brown manila envelope and the ninety-five papers or bindles.

Q. Where was he coming from when you took the sack from him?

A. He was coming from the entrance of the—passage entrance of the garage which is located to the rear of the property at 6827 Brownsville Street, Houston, Texas.

Q. And what was he doing at the time you took the sack [fol. 63] from him?

A. He was standing within two feet or just within the gate area of the property.

Q. Did you notice any particular type of license plate on the Cadillac automobile?

A. A 1956 Illinois license plate 379-137, I believe.

Q. Now, at the time you took this sack and the contents, was it in the same form it is now in your hands, sir?

A. Yes, sir, it is, or was.

Q. Do you find any federal tax stamps which are required by law on any of those contents now?

A. There were none found.

Q. Nor at that time?

A. None at that time.

Q. And this is now in the same condition as the time you took it?

A. It is.

Mr. Scott: Judge, without renewing my objection to each question, I object to what was found by virtue of the search, the fact that they had no search warrant. It is my understanding that my objection and exception goes to this.

The Court: It can be taken along with the case.

Mr. Scott: Yes, sir. I didn't want to be renewing it as [fol. 64] to each question. Something might slip in to ruin my motion.

The Court: All right. Any time you care to you make your objection.

Mr. Scott: Does it go to all of what he found by virtue of the arrest and search? I didn't want to renew it as to each question.

The Court: Either way. It can go to the entire testimony of this witness or the witness Shelton.

Mr. Scott: Yes, sir.

Q. (By Mr. Dowd) Mr. Finley, what did you do with this Exhibit 1-A when you received it, sir?

A. At the time of seizure, at the time it was taken away from the defendant Veto Giordenello, Officer Shelton took it into custody and maintained custody over it until in my presence he had initialled each of the ninety-five bindles or papers and all of the contents in the paper sack.

He then turned it over to me and in my custody I initialed it, weight and sealed the envelope, and placed it in a locked sealed envelope and sent it to the United States Chemist. at Dallas, Texas, by registered mail.

Q. I direct your attention to an exhibit marked 1-B, and ask you if you recognize that, sir?

[fol. 65] A. I do.

Q. What is that?

A. This is the original locked sealed envelope in which the evidence was sent to the United States Chemist at Dallas, Texas, by registered mail.

Q. Did you have a warrant for the arrest of the defendant at the time you arrested him, sir, on the 27th day of January, 1956?

A. I did.

Q. At the time of arrest, Mr. Finley, did you identify yourself to the defendant Giordenello?

A. I did.

Q. Did you make any threats or promises to him at that time?

A. I did not.

Q. After having so identified yourself and not having made any threats or promises, did you have any conversation with him?

A. I did.

Q. Would you relate the substance of those conversations?

A. I warned him of his constitutional right under the Fifth Amendment, told him he did not have to say anything to me, but anything he said would be held against me — against him. Excuse me.

[fol. 66] At that time he stated that he had received the heroin in Chicago, that it had been one ounce of pure heroin, that he had adulterated it, cut it into the present condition, six ounces, and brought it to Houston.. That the connection

in New York was one Benny on the lower East Side, and this Benny ran a restaurant on the lower East Side of Manhattan, and he stashed his narcotics, kept his narcotics with a colored woman who could pass for white in upper Manhattan.

Further that Benny's connection was in New Jersey, and this Benny delivered—had delivered anywhere from twenty to forty ounces of pure heroin a week from New York-New Jersey to Chicago.

Q. Now, in order that we are clear, you have referred to heroin generally and specifically. Were there any conversations, or what part of the conversation that you just related refers to Exhibit 1-A about being——

A. All of it.

Q. All of it?

A. Yes, sir.

Q. He did admit that it was his?

A. He did. I asked him if any of it had gotten away or if we had missed any of it, any of the heroin that he had, and he said no, we had gotten it all.

[fol. 67] Q. Would you read the registry number on Exhibit 1-B, please, sir?

A. It is marked 13683, 13684, I believe.

Q. And you did inspect the contents of 1-A at the time of arrest and found no federally required tax stamps on any of the packages?

A. No, sir, I did not. I inspected it but did not find them.

Mr. Dowd: At this time, Your Honor, I would like to offer in evidence Exhibits 1-A and B. Exhibit 1-A we will prove the contents two witnesses from now.

Mr. Scott: Of course, our objection is this was obtained from the defendant without a warrant, on a purported warrant of arrest not based upon a legal complaint, and there was no search warrant issued in this case.

The Court: Objection overruled. Admitted in evidence.

(Thereupon an instrument was marked for identification as Government's Exhibit No. 2, being the same instrument heretofore marked as Defendant's Exhibit No. 2.)

Q. (By Mr. Dowd) Mr. Finley, I direct your attention to Government's Exhibit 2, which is a warrant of arrest, and

[fol. 68] ask you, sir, is that the warrant that you had on the night that you arrested the defendant in this case?

A. I am not able to identify that as the particular one, no. My name does not appear on it and there are no markings on it. That appears to be the same warrant that was issued by Mr. Costa.

Q. What date was it issued, sir?

A. January 26, 1956.

Mr. Scott: We are going to object to it because the witness says he can't identify it as the warrant.

The Court: Has it been offered?

Mr. Dowd: No, sir, it has not.

Mr. Scott: I thought it had. Excuse me.

Mr. Dowd: At this time I would like to ask the Court to take judicial notice of the file that is in the Clerk's office, that the defendant in this case was arrested on a complaint and warrant. I believe the records are in Mr. Costa's file.

Mr. Scott: We will object to that. The warrant referred to does not show it was executed by this office but by the United States Marshal. And it would be attempting by parol evidence to alter a written instrument on file with the Clerk of the court.

[fol. 69] The Court: I will let it in subject to your objection.

Mr. Scott: Note our exception.

Would Your Honor like to inspect it? I was referring to something without showing it to the Court.

(Thereupon an instrument was marked for identification as Government's Exhibit No. 3, being the same instrument heretofore marked as Defendant's Exhibit No. 3.)

Mr. Scott: May it please the Court, the further objection that since the affidavit was executed before the Commissioner and since the warrant was executed they have been altered and the name changed and it is not such a change that comes within the doctrine of idem sonans.

The Court: Overruled.

Mr. Scott: Note our exception.

Q. (By Mr. Dowd) Mr. Finley, I direct your attention to Exhibit 3, a standard form of complaint, and ask you if your signature appears on there?

A. It does.

Q. And does any other signature appear?

A. Yes, sir.

Q. Whose is that?

[fol. 70] A. William H. Costa, United States Commissioner.

Q. What does that instrument represent to you?

A. The complaint filed before Mr. Costa by myself against Veto Giordenello.

Q. What is the date of that?

A. January 26th, 1956.

Q. And Exhibit 2 is a warrant issued on the same date, sir?

A. Yes, it is.

Q. Were you given a warrant, physically have a warrant in your possession to arrest this defendant?

A. Yes, sir, I did.

Q. Do you recall the date of that warrant?

A. January 26th, 1956.

Q. Did you ever have any other warrant in your life dated January 26th, 1956, for the arrest of Giordenello, the defendant here?

A. No, sir. I never have.

Mr. Dowd: The Government offers in evidence, Your Honor, Exhibits 2 and 3, the complaint and warrant.

Mr. Scott: One question would be easy to answer if the Court would permit me a question on voir dire?

The Court: Certainly.

[fol. 71] Voir dire examination.

Q. (By Mr. Scott) Mr. Finley, at the time you say a warrant was handed you by the Commissioner, a warrant of arrest?

A. Yes.

Q. Could you look at this warrant and tell me what name appeared on the warrant you had that was given you by the Commissioner?

A. The name pertaining to what particular person? William H. Costa?

Q. No, sir, tell us the two names of the defendant.

A. United States versus Veto Giordenello.

Q. Yes, sir.

A. Veto Giordenello.

Q. What was the name on the warrant you had?

A. Veto Giordenello.

Q. Well, do you see two names there?

A. I see two spellings of one name, one of which is crossed out.

Q. Will you spell it?

A. V-E-T-O G-I-O-R-D-E-N-E-L-L-O and V-I-T-O G-I-O-D-A-N-I-L-L-O.

Q. Which one of those names appeared on the warrant when you received it?

Mr. Dowd: Your Honor, I object to this. I believe the [fol. 72] instrument speaks for itself.

The Court: Overruled.

The Witness: At the time of the issuance of the warrant I believe I can recollect the name V-I-T-O G-I-O-D-A-N-I-L-L-O.

Q. (By Mr. Scott) That name is scratched out in the warrant, Government's Exhibit 2?

A. Yes.

Q. And another name inserted above it?

A. Yes, sir. Same name, different spelling.

Q. One is V-I-T-O and the other is V-E-T-O?

A. The one crossed out is V-I-T-O.

Q. And G-I-O-D-A-N-I-L-L-O?

A. Giodanillo.

Q. Is there any "R" in that name?

A. Which name is that?

Q. The one scratched out. You wouldn't pronounce it Giordenello.

Mr. Dowd: I object to all this.

Q. (By Mr. Scott) Is it a name you can pronounce?

A. Giodanillo, yes, sir.

Q. Do you remember when the other name was inserted in the warrant?

A. I can recollect, I believe, sir, that Veto Giordenello, Mr. Costa asked Mr. Giordenello the proper spelling of [fol. 73] his name, and at that time I believe I was sitting there and witnessed the initialing by Giordenello of the correction in the spelling of his name, yes, sir.

Q. In number 3 it is also changed?

A. Yes, sir, it is.

Q. And both of those changes were made after the papers had been issued and had been—the warrant had been placed in your hands?

A. Yes, sir.

Q. Was it about the 28th?

A. These changes were made upon the return to Mr. Costa, the physical return of the warrant.

Mr. Scott: Now we want to object first because the affidavit has been changed, and to change an affidavit without reswearing to it would destroy the effect of it, and they are not idem sonans.

The Court: Overruled.

Direct examination, continued.

Q. (By Mr. Dowd) Mr. Finley, when you took out the complaint, Government's Exhibit No. 3, regardless of the spelling of the name, did you have in mind the person against whom that complaint was issued?

A. I had in mind the name of the person to whom—the defendant here, and the spelling here is——

[fol. 74] Q. Setting the spelling aside for a moment. Did you know against whom you were taking out that complaint at the time you took it out?

A. Against the defendant.

Q. And is it the same defendant Giordenello that is in this court room today?

A. It most certainly is.

Q. And Exhibit 2, the warrant of arrest, at the time you executed such a warrant, regardless of the spelling, did you have in mind the person that you had taken the complaint out against?

A. I did.

Mr. Scott: We want to object because the warrant of arrest shows it was executed by another officer and not by this officer.

The Court: Overruled.

Q. (By Mr. Dowd) You had in mind that this warrant was the person that you had taken the complaint out against in Exhibit 3?

A. That's correct, I did.
Q. Regardless of the spelling?
A. Yes.
Q. Typographical errors, or minor details like that.
A. Yes, sir.

Mr. Scott: May it please the Court, that is leading and [fol. 75] suggestive.
The Court: Don't lead the witness.
Mr. Scott: I move that that be stricken.
The Court: That's right. "Typographical errors or minor defects."
Mr. Dowd: Pass the witness.

Cross examination.

Q. (By Mr. Scott) Mr. Finley, was this name on the Government's Exhibit No. 2, which is the warrant of arrest, changed before or after the United States Marshal made his return of this warrant, if you know?

Mr. Dowd: If the Court please, I believe he is calling for a conclusion that the marshal made the return.
Mr. Scott: It speaks for itself, Your Honor. It's a written instrument.
The Court: Just ask when it was made.

Q. (By Mr. Scott) Tell me when the change was made as to the name in the Government's Exhibit No. 2.
A: The ——

Mr. Dowd: May I take the witness on voir dire for about two questions, Your Honor?
The Court: All right.
Mr. Dowd: Mr. Finley, did you make the change?
The Witness: No, sir, I did not.
[fol. 76] Mr. Dowd: I object to this witness testifying as to when the change was made. I believe the person who made it is the best evidence.
The Court: If he was present and saw it made I will let him answer.

Cross examination, continued.

Q. (By Mr. Scott) Were you present, and did you see it made?

A. I was present and heard some conversation as to the change. I can't testify I physically saw the change made, no.

Q. When was that? What time of day and what date?

A. That was during the waiting of the hearing of Veto Giordenello and his attorney in the office of Mr. —— the United States Commissioner, Mr. Costa. I believe that was on the 28th of January, '56.

Q. Twenty-eighth day of January?

A. I believe in the early afternoon or late morning.

Q. I hand you here Government's Exhibit 3, complaint for violation of United States Code, Title 21, Section 174, and ask you if that is the original instrument you executed?

A. This is the complaint, the original complaint.

Q. Yes, sir.

A. Yes, sir.

[fol. 77] Q. Made by you, Mr. Finley?

A. The complaint was made by me, yes, sir.

Q. This is dated the 26th day of January, 1956?

A. It is, yes, sir.

Q. Within three years prior to January 26th, 1956, Mr. Finley, of your own knowledge, did you see Veto Giordenello receive, conceal, any narcotic drugs?

A. Excuse me. Within three years prior?

Q. Yes. Limitation on this is five years. I want to get the period of limitation.

Mr. Dowd: I object to this. I don't see the relevancy in this, in that is has already been gone over in the previous motion, going to the validity of the complaint.

The Court: We devoted a whole lot of time to the motion, which was overruled after a hearing.

Mr. Scott: May we consider the testimony in the motion introduced at this time? On re-introduction?

The Court: It is a separate transaction, and will be part of the transcript, if there is a transcript.

Mr. Scott: Yes, sir.

The Court: We can go forward on the facts. That is the matter we heard last Friday.

Mr. Scott: No further questions, Your Honor.

[fol. 78] The Court: Is that all?

Mr. Dowd: Yes, sir. Thank you.

The Court: Call your next witness.

GEORGE D. SHELTON, a witness called on behalf of the Government, testified on his oath as follows:

Direct examination.

Q. (By Mr. Dowd) State your name and occupation, please.

A. George D. Shelton, narcotics officer, City of Houston Police Department.

Q. Where do you live, Mr. Shelton?

A. Houston, Texas.

Q. How long have you been with the narcotics division of the Houston Police Department?

A. About a year.

Q. And how long have you been employed by the Houston Police Department?

A. Over three years.

Q. Mr. Shelton, did you have an opportunity to see the defendant Veto Giordenello on the 27th day of January, 1956?

A. Yes, sir, I did.

Q. Where did you first see him on that date?

A. 2901 Airline Drive.

[fol. 79] Q. And who were you with when you observed the defendant at that address?

A. Agent Finley of the Federal Narcotic Bureau.

Q. At Airline Drive, Houston, Texas?

A. Yes, sir.

Q. All right. Would you tell the Court what you observed when you first saw the defendant on Airline Drive?

A. The first time I saw the defendant on Airline Drive——

Q. On the 27th of January, 1956.

A. Yes, sir. It was approximately 5:30, 5:45 p.m., at which time we kept him under surveillance until later when he came out of his house, got into his car, and we followed him to 6827 Brownsville Street,

Q. Houston, Texas?

A. Houston, Texas.

At which time Agent Finley and myself were sitting on the steps of the grocery store directly across the street from 6827 Brownsville Street, and from which we watched the defendant Veto Giordenello approximately thirty min-

utes, when he came out of the house and went into a garage, one-car garage, in the rear of the house at 6827 Brownsville.

Q. And after he went into the garage what did you see [fol. 80] next?

A. In a very few seconds he came out of the garage, at which time Agent Finley and myself walked across the street, walked up to the defendant, at which time he was carrying a small brown envelope.

Q. I show you what has been marked as Government's Exhibit 1-A, and ask you if you have seen that before?

A. Yes, sir.

Q. What is it?

A. This is the brown paper sack which the defendant had in his left hand.

Mr. Scott: We are going to object to what he found or he had in his hand because it was not by virtue of a search warrant or a warrant of arrest based upon a valid complaint.

The Court: Overruled.

Mr. Scott: And to all of his testimony so it will run through, so I won't be bothering the Court with a continual objection.

The Court: Yes, sir. As to the invalidity of the search.

Mr. Scott: Yes, sir.

Q. (By Mr. Dowd) How do you identify that sack?

A. This is the sack on which I placed the defendant, the address, the date and my initials.

[fol. 81] Q. Would you look in the sack, Mr. Shelton, and tell us what you find in there?

A. This is the small brown sack which was in the large paper sack at the time which we confiscated it from the defendant.

Q. Anything else?

A. Yes. The papers or bindles, at which time ninety-five was in this sack. There was also put on by me the date and my initials on each.

Q. Where was the defendant at the time you took this sack from him?

A. He was just inside the gate of the yard at 6827 Brownsville.

Q. And where was his automobile?
A. It was parked just across the ditch.
Q. What type of car was it?
A. It was a 1955 Cadillac Coupe de Ville.
Q. Do you recall what type of license plate it had on it?
A. It had 1956 Illinois license plates.
Q. Who took the sack from the defendant's hand?
A. I took it from his left hand.
Q. And what did you do with the sack after you took it from the defendant?
A. I kept it in my possession until we got to the narcotic [fol. 82] office at the Houston Police Department.
Q. What——
A. At which time I placed my initials on the papers and the small brown envelope and brown paper sack and then I turned it over to Agent Finley.
Q. That is Agent Finley who just previously testified in this trial?
A. Yes, sir.
Q. And that was all done on the same date? The same evening of the 28th of January, 1956?
A. Yes, sir.
Q. Did you see any tax stamps, federal tax stamps on any of the papers in the Exhibit 1-A?
A. No, I did not.
Q. And you find Exhibit 1-A to be in the same condition it was on the occasion you took it from the defendant?
A. Yes, sir.
Q. After looking at it here in the court room?
A. Yes, sir.
Q. Was there anything on it in the way of original packages or tax stamps?
A. No, sir, there wasn't?
Q. At the time the arrest was made on Brownsville Street in Houston did you hear any threats or promises made to [fol. 83] the defendant Giordenello?
A. No, sir, I did not.
Q. Did you have any conversations with him at the time of the arrest?
A. Yes, sir.
Q. Did you identify yourself to him?
A. Yes, sir.

Q. How did you identify yourself to him, Mr. Shelton?

A. Agent Finley showed the defendant his identification and told him who he was, and at that time I told the defendant Veto Giordenello I was a city narcotics officer working with Agent Finley and the Federal Bureau of Narcotics.

Q. Now, did you have any conversations with the defendant Giordenello at the time of his arrest?

A. Yes, sir.

Mr. Scott: If the Court please, I think our objection went to the testimony, the conversation—I want to be sure it goes to this as well.

The Court: Overruled.

Q. (By Mr. Dowd) What conversation, in substance, do you recall?

A. At first when I took the sack out of Veto's hand I asked him what was in it. He said washing machine parts. At which time I placed handcuffs on him, opened the sack [fol. 84] and looked inside, which I noticed the papers and the large container which I believed to be heroin.

Q. Did you have any discussions as to who owned the substance in the Exhibit 1-A?

A. Yes, sir.

Q. And what conversations, in substance, did you have?

A. After we placed the defendant in the car we asked him if the subject at that address had any dealings with the heroin. He said no, he did not know anything about it. It was his, and the man that lived there did not know anything about it.

Q. He was referring to the person who lived at this Brownsville Street address?

A. Yes.

Q. And he said it was his heroin?

A. Yes.

Q. At the time you observed the defendant out on Airline Drive, I believe you testified he started to drive and then you all followed him, is that right?

A. Yes.

Q. To the Brownsville Street address?

A. Yes.

Q. Did you notice anything else out around there at that time, during this period of surveillance, while you were watching?

[fol. 85] A. Yes, sir.

Q. Tell us what you observed.

A. At the time Giordenello came out of his residence on Airline onto Airline Drive, there was another subject who I recognized as being a well-known police character——

Mr. Scott: We are going to object to this as prejudicial and showing that he was there or some well-known police character was there, unless it is shown whether it is material. It is immaterial and irrelevant.

The Court: I will let him state it, subject to your motion to strike if it isn't material.

Go ahead.

The Witness: Which the other subject was recognized by me, which was following Giordenello——

The Court: When did he come into the picture? After you had arrested him?

The Witness: No sir. Just as the defendant pulled out of his drive into Airline the other subject was at his house, got into his car and was pulling out behind the defendant, was following bumper to bumper.

The Court: From Airline over to Brownsville?

The Witness: Yes, sir.

Q. (By Mr. Dowd) What type of automobile was this [fol. 86] subject—this other individual in?

A. It was an old model black Chevrolet.

Q. Did he come out of the same house the defendant came out of on Airline Drive?

A. Yes, sir.

Q. They each got into separate cars?

A. Yes, sir.

Now, when Giordenello got over to the Brownsville Street address, he parked his car, is that correct?

A. Yes, sir.

Q. What did you observe, if anything, about this other person driving his car?

A. The other subject—at first, before the defendant went into the Brownsville address he and the other subject stopped side by side one block north of Brownsville on Lathrop, at which time they stood there for approximately two or three minutes talking with the defendant out of his car over to the other subject's car. The defendant turned right,

which would be south on Lathrop down one block to 6827 Brownsville, at which time the other subject turned to his left on Lathrop, which would be going north, pulled down one block, and parked beside a little beer joint on the corner and set in his car. At which time Agent Finley and myself [fol. 87] went up to Lathrop and Brownsville, parked out car around the corner and set on the steps of this grocery store.

Mr. Dowd: Pass the witness.

Mr. Scott: If the Court please, I move that this last testimony be stricken because it isn't shown there was any law violated whatsoever. It is irrelevant and immaterial and burdensome to the record.

The Court: Overruled.

Mr. Scott: No questions, Your Honor.

Kenneth B. Anderson, Jr., a witness called on behalf of the Government, testified on his oath as follows:

Direct examination.

Mr. Scott: Judge, for the record we would admit Mr. Anderson's qualifications and his job.

The Court: All right. A Government chemist.

Q. (By Mr. Dowd) State your name and occupation, please.

A. Kenneth B. Anderson, Jr. I am a chemist for the Alcohol and Tobacco Tax Division, U. S. Treasury Department.

Q. Mr. Anderson, I will show you Exhibit 1-A and ask you, sir, if you will look at the contents and tell us what that is.

[fol. 88] A. It contains a bag that I have initialed with my initials K. V. A. and the numbers. I identified this brown envelope with the laboratory number 13683, and I identify my initials on these packets, and it contains——

Mr. Scott: If the Court please, we are going to object to this testimony of Mr. Anderson for the reason that the exhibit shown to him was obtained by the officer who placed

it in his possession without a search warrant and without a valid warrant of arrest.

The Court: Objection overruled.

The Witness: It contains in the brown envelope 1395 grains of heroin hydrochloride, 15.5 per cent anhydrous heroin; and in the ninety-five packets contains a total of 1211 grains of heroin hydrochloride, 15.1 anhydrous heroin.

Q. (By Mr. Dowd) You examined that personally yourself, sir?

A. Yes; I did.

Q. You ran a number of the usual checks on it?

A. Yes.

Q. Approximately how many ounces is there?

A. Well, the bulk is approximately 3.2 ounces, and the ninety-five packets are approximately 2.8 ounces, making a total of 6 ounces, approximately, or 2606 grains.

[fol. 89] Q. How did you receive the Exhibit 1-A, Mr. Anderson?

A. 1-A was received in this envelope which is marked Government's Exhibit 1-B by registered mail, and received January 31, 1956, and it was received in this locked envelope, sealed. I opened it and analyzed it and replaced it in Government's Exhibit 1-A.

Q. And you kept Government's Exhibit 1-A in your possession from receipt until when?

A. Yes. It was placed in our vault in Dallas, and I brought it into court with me and turned it over to you.

Q. Today?

A. Yes, sir.

Q. What is the registry number under which you received it? Under which you received 1-A, sir?

A. Received by registry number 8388.

Mr. Dowd: Pass the witness, Your Honor.

Cross-examination.

Q. (By Mr. Scott) Mr. Anderson, you kept a record of this package? You keep a record of packages and its contents that have been received and identified?

A. Yes, sir. We have a record.

Q. Now, when you weighed it, did you weigh it paper and all?

A. No, sir. I removed the contents.

[fol. 90] Q. Out of each?

A. Yes.

Q. Out of each one of the little papers?

A. Yes.

Q How much heroin was there and how much milk sugar or foreign substance?

A. I think the analysis of one was fifteen and a half per cent—I don't remember which way it was. The papers, I think, were 15.1 per cent heroin.

Q. Fifteen per cent of the 6 ounces?

A. Yes, sir, a little less than an ounce of pure heroin.

Q. Just a little less than an ounce of heroin?

A. Yes.

Q. And the other was a non-prohibitive substance?

A. Yes, as far as I know.

Mr. Dowd: If he is referring to a legal non-prohibitive substance I object to it as calling for a conclusion which this witness is not qualified to answer.

The Court: At any rate, it wasn't heroin?

The Witness: No, sir. Some substance other than heroin.

Q. (By Mr. Scott) At any rate, you did not analyze it?

[fol. 91] A. No, sir, we don't do that.

Q. So it would be about 15 per cent of 6 ounces. That would be less than one ounce, wouldn't it?

A. Yes, sir. About nine-tenths of an ounce, approximately.

Mr. Scott: About nine-tenths of an ounce. Thank you, Mr. Anderson. That's all.

The Court: Both through?

Mr. Dowd: Yes, sir. Thank you very much, Mr. Anderson.

The Government rests, Your Honor.

The Court: The Government rests. What says the defendant?

Motion for Directed Verdict and Denial Thereof

Mr. Scott: The Government rests, and we will rest too and move the Court to direct a verdict of not guilty for the reason that no search warrant, no valid warrant of

arrest based upon a valid complaint, and there is no testimony by the tax collector or a person authorized to issue tax stamps or to license people they have not issued a license to the defendant.

The Court: Overruled.

Mr. Dowd: The Government would like—shall we say a word, Your Honor?

The Court: I have ruled on the motion. Would there be any further testimony?

[fol. 92] Mr. Dowd: No, sir.

The Court: How much time do you want to argue?

Mr. Dowd: A very short time, Your Honor, for me.

Mr. Scott: I think the Court understands my position without argument.

The Court: That's right. Your sole defense is lack of legal search.

Mr. Scott: Yes, sir.

Mr. Dowd: In view of that, just a few minutes for me.

The Court: Go ahead.

(Short argument.)

The Court: No further argument?

Mr. Scott: I think the Court understands my position. I am protecting my record.

VERDICT

The Court: On Count 1 the Court finds the defendant guilty as charged. Count 2 has been heretofore dismissed, of course.

Presentence by Friday of this week.

Committed.

The Clerk: Can the Government chemist withdraw this?

Mr. Scott: Yes, he sure can.

The Court: Is it all right for the Government chemist to have the exhibits?

[fol. 93] Mr. Scott: Yes, sir, perfectly agreeable with me.

[fol. 94] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

Transcript of Proceedings—May 11, 1956

I, Howard J. Boland, deputy official shorthand reporter for the United States District Court for the Southern District of Texas, hereby certify that the following is a true and complete transcript of the proceedings had before His Honor, Allen B. Hannay, Judge of said Court, on the 11th day of May, 1956. Witness my official hand this 28th day of May, 1956.

Howard J. Boland, Substitute Official Reporter, United States District Court, Southern District of Texas.

[fol. 95] APPEARANCES:

C. Anthony Friloux, Esq., Assistant United States Attorney, Houston, Texas, For the Government.

Clyde W. Woody, Esq., 2501 Crawford Street, Houston, Texas, For the Defendant.

COLLOQUY BETWEEN COURT AND DEFENDANT

The Court: Mr. Giordenello, one of your attorneys, Mr. Woody, and your bondsman in one or two cases, Mr. Morello, have told me that Mr. Morello wanted to get off two of your bonds, one for $30,000 and one for $40,000. One was the appeal bond and the other was on the two or three count one in the second case. He wanted to get off the bond in the amounts of thirty and forty thousand dollars respectively, thirty thousand appeal bond, and I didn't know whether that was satisfactory with you or not.

I didn't know whether you had paid this bondsman some money and you didn't want him to get off your bond. He didn't give any reason why he wanted to, and I thought [fol. 96] it was the right thing for you to be given the opportunity to tell me whether or not it was agreeable with you.

Mr. Giordenello: Yes, sir.

The Court: To let him go off the bond in both instances?

Mr. Giordenello: Yes, sir.

The Court: You understand that?

Mr. Giordenello: Yes, sir.

The Court: If you have any complaint as to his wanting to go off, any reason why he shouldn't, if you have paid him a substantial sum of money or anything of that nature and you don't want him to, I will certainly listen to whatever you have to say in that regard.

Mr. Giordenello: No, sir, I didn't pay him anything, so it's perfectly all right with me.

The Court: In both instances?

Mr. Giordenello: Yes.

The Court: Both bonds?

Mr. Giordenello: Yes, sir.

The Court: Then I will permit him to go off both of the bonds that he is on now, and surrender you to the marshal, which is, I believe, already the fact.

[fol. 97] IN UNITED STATES DISTRICT COURT

FINAL JUDGMENT AND SENTENCE—Entered March 9, 1956

On this 9th day of March, 1956, came the attorney for the United States of America, and the defendant, Veto Giordenello, appeared in person and with counsel.

It is adjudged that the defendant has been convicted upon his plea of not guilty and in accordance with the findings of the Court rendered in this cause on the 5th day of March, 1956, of the offense of unlawfully purchasing narcotics, in violation of Section 4704, Title 26, U. S. Code, as charged in Count 1 of the Indictment; and of a previous conviction for violation of the narcotic laws, the defendant having affirmed in open court that he is identical with the person previously convicted; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, and the defendant having been afforded an opportunity to make a statement in his own behalf and present any information in mitigation of punishment;

It is adjudged that the defendant is guilty as charged and convicted on Count 1; Count 2 having been dismissed by the Court on motion of the Government.

[fol. 98] It is the sentence of the court that the defendant be and he is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Eight (8) Years; and that he pay a fine of Twenty-five ($25.00) Dollars on Count One.

It is ordered that the United States of America recover from the defendant the sum of $25.00, named above, for which execution may issue. In default of the payment of said fine, the defendant is to be committed until the fine is paid or until he shall be discharged under Sec. 3569, Title 18, U. S. Code, or otherwise lawfully discharged.

It is further ordered that the Clerk deliver a certified copy of this judgment to the United States Marshal, or other qualified officer, and that the same shall serve as the commitment herein.

(S.) Allen B. Hannay, Judge.

Approved by: (Initials illegible.)

The Court recommends commitment to: Texarkana, Texas.

[fol. 99] In United States District Court

Motion for New Trial—Filed March 9, 1956

To the Honorable Judge of the Court Aforesaid:

Now into Court comes the defendant, Veto Giordenello, in the above styled and numbered cause and respectfully moves the Court to grant him a new trial herein for the following reasons, to wit:

I

That the Court erred in refusing to sustain the Motion to Suppress, filed by this defendant, for the reasons that the complaint made before the United States Commissioner, at Houston, Texas, was not made upon the personal knowledge of the complainant, and is unsupported by other proof and conferred no jurisdiction upon the United States Commissioner to issue a warrant of arrest. That the warrant of arrest so issued by the Commissioner was used as a search warrant in the relation that the defendant was searched at the time that the said warrant was executed and the evi-

dence upon which this defendant was convicted was thus illegally obtained. That the complainant in the complaint was Mr. William Thomas Fendley, a narcotic officer of the United States of America, and was the same and identical person who used the warrant for the purpose of a purported [fol. 100] arrest and search of this defendant and to obtain evidence which was the basis of this prosecution.

II

That the Court erred in permitting evidence to be admitted over the objection of the defendant of the witnesses William Thomas Fendley and George D. Shelton as to the result of an illegal search of the defendant made contemporaneously with the illegal arrest of the defendant upon a purported warrant issued contrary to Rule 3 of the Federal Rules of Criminal Procedure, in that the complaint issued and executed before the U. S. Commissioner in this cause *doe* not contain a written statement of the essential facts constituting the offense charged.

Defendant further says that the purported warrant of arrest was not in compliance with Rule 4 of the Federal Rules of Criminal Procedure and was not executed as provided in subdivisions 3 and 4 of Rule 4 in that the same was not served by the officer William Thomas Fendley at his first seeing the defendant, but was kept until a latter day when the same was served for the purpose of making a search of the person of this defendant, and said officer did not make a return thereof as provided by law.

III

[fol. 101] Defendant further says that the complaint was made on the 26th day of January, 1956, and at the time of the making of said complaint he had violated no laws of the United States of America and no cause existed for the making of the said complaint and no facts existed upon which to base said complaint, that the said complaint was made for the purpose of obtaining a warrant of arrest to be used as a search warrant. Defendant says that no facts existed for the issuance of a search warrant. That the entire procedure is violative of the Constitution of the United States of America, Amendment Four thereof, and deprives this defendant of due process of law to which he is

guaranteed under the Constitution and laws of the United States of America.

IV

This defendant further says that at the time the complaint was sworn to before the United States Commissioner at Houston, Texas, he was guilty of no offense against the laws of the United States of America, and that all of the evidence upon which he was convicted was obtained as the result of the complaint and warrant of arrest of which he has complained and on a date anterior to the execution of the com-
[fol. 102] plaint and the issuance of the warrant of arrest. In this connection defendant says that the officer making the complaint at the time he made the same did not have personal knowledge of the violation of the laws of the United States of America and particularly Title 21, article 174, U. S. C. A. and also knew all of the facts and circumstances with relation thereto in the issuance of the warrant of arrest.

This defendant says that he has not been prosecuted for a violation of Title 21, section 174 which occurred on January 26th, 1956, or prior thereto, and so far as he knows there is none.

Wherefore defendant Veto *Girdenello* prays the Court to grant him a new trial herein for the reasons as set forth herein and to the end that justice may be done, for which he prays an order of the Honorable Court.

(S.) Veto Giordenello, Counsel of defendant.

Duly Sworn to by Veto Giordenello. Jurat omitted in printing.

[fol. 103] In United States District Court

Notice of Appeal.—Filed April 16, 1956.

To the Honorable Judge of the Court Aforesaid:

Now into Court comes the defendant Veto *Girdenello*, who resides at 2901 Airline Drive, Houston, Texas, and hereby gives notice of appeal from the judgment and order of this

Honorable Court to the United States Circuit Court of Appeals, Fifth Circuit, at New Orleans, La., and says:

I

The names and addresses of his attorneys are as follows:

[fol. 104] Clyde W. Woody, 2501 Crawford Street, Houston, Texas, and William H. Scott, 1312 Commerce Building, Houston 2, Texas.

II

That defendant is charged with the violation of Article 4704, Title 26, U. S. C. A., in that he had in his possession *thereoin*, which was not in the original stamped package and upon which the tax had not been paid.

III

The judgment of the Court was dated March 9th, 1956, and finds the defendant guilty of the above offense, and the sentence was dated March 9th, 1956, and fixed the punishment at eight years in the United States Penal Institution, in the custody of the Attorney General of the U.S., the court recommended the institution at Texarkana, Texas, and a fine of twenty-five Dollars ($25.00).

IV

That this defendant appeals from the judgment and order of this Court pursuant to Rule 37, of the Federal Rules [fol. 105] of Criminal Procedure, to the United States Circuit Court of Appeals, Fifth Circuit, New Orleans, La.

Respectfully submitted, (S.) Clyde W. Woody, (S.) William H. Scott, Attorneys for defendant.

[fol. 106] In United States District Court

Bail Bond Pending Appeal—Filed April 23, 1956

Know All Men by These Presents, that we, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to the United

States of America the sum of Thirty Thousand Dollars ($30,000.00).

Whereas, the United States District Court for the Southern District of Texas, Houston Division, on the 5th day of March, 1956, entered a judgment in the cause styled United States of America vs. Veto Giordenello, being No. 12,798 on the docket of the court aforesaid, wherein the said Veto [fol. 107] Giordenello was sentenced to serve eight years and a fine of twenty-five dollars, to be paid; and the defendant having filed a Notice of Appeal to the United States Court of Appeals for the Fifth Circuit to reverse the order of judgment and decree.

Now, the condition of the above obligation is such that if the appeal be dismissed or the order, judgment or decree be affirmed, and Veto Giordenello will surrender himself to the United States *Marshall* for the Southern District of Texas, then this recognizance will be null and void, otherwise, to remain in full force and effect.

This bond is signed on this the *18* day of April, 1956, at Houston, Texas.

(S.) Veto Giordenello, Principal, 2901 Airline Dr.
(S.) 29 Joe Morello, Surety. 2515 Grammercy.

Signed and acknowledged before me this the *18th* day of April, 1956, at Houston, Texas.

(S.) Ralph L. Fowler, U. S. Commissioner

[fols. 108-112] Approved: (S.) Ralph L. Fowler, U. S. Commissioner.

[fols. 113-114] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 115] In United States Court of Appeals

Minute Entry of Argument and Submission—
November 14, 1956

(Omitted in Printing)

[fol. 116] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16065

VETO GIORDENELLO, Appellant

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Southern District of Texas

OPINION—January 31, 1957

Before Rives, Tuttle and Cameron, Circuit Judges

TUTTLE, Circuit Judge: This appeal from the conviction of appellant of the offense of unlawfully purchasing five ounces of heroin, in violation of Section 4704, I.R.C. 1954, 26 U.S.C.A.,[1] presents the single question whether the trial [fol. 117] court erred in admitting in evidence the heroin which was found on his person when he was arrested. The answer to this question in turn hinges on the legality of Giordenello's arrest.

On January 26, 1956, William T. Finley, an enforcement agent for the Bureau of Narcotics, obtained from the United States Commissioner in Houston, Texas, a warrant for the arrest of Giordenello on a complaint sworn to by Finley and asserting that Veto Giordenello did receive, conceal, etc. narcotic drugs, to wit: heroin hydrochloride, with knowledge of unlawful importation, in violation of

[1] "§4704. *Packages*

(a) General requirement.—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the orignal stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose posession the same may be found."

21 U.S.C.A. §174.[2] At 6 P.M. the following day, having seen Giordenello several times meanwhile and having followed him to a residence other than his own, Finley and another agent waited for him to reappear. He did so about half an hour later, coming out of the back of the house, going into a garage, and then emerging and approaching the gate in the fence of the backyard. They identified themselves and put him under arrest, asserting they did so under the above described warrant, and took from him a paper package he was carrying in his hand containing [fol. 118] five ounces of heroin. After being warned of his rights, appellant freely admitted the possession, telling the officers he had obtained the heroin in Chicago and that he had adulterated it and put it into small "bindles" or packets. He was later indicted and tried for purchasing this five ounces of heroin, which of course could not be the offense for which the warrant had been isued.

Before the trial, appellant filed a motion to suppress the evidence of the officers relating to the seizure and admission of the possession as well as the heroin itself. The ground for such motion was that appellant was searched without a search warrant and without probable cause. The court overruled the motion to suppress. The case proceeded to trial before the court without a jury and resulted in a judgment of guilty and sentence of eight years for a second offense.

The real basis of the attack on the admissibility of the

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[2] The complaint is here reproduced:

"Before William H. Costa, Houston, Texas,
The undersigned complainant being duly sworn states: That on or about January 26, 1956, at Houston, Texas in the Southern District of Texas, Veto Giordenello did Receive, Conceal, Etc., Narcotic Drugs, to wit: Heroin Hydrochloride with Knowledge of Unlawful Importation: In Violation of Section 174, Title 21, United States Code.

And the complainant further states that he believes that —— ——, are material witnesses in relation to this charge.

(S.) Wm. Thomas Finley, Narcotic Agent."

evidence is appellant's contention that the seizure was made without a search warrant (which is, of course, undisputed) and that it was not permissible as incidental to an arrest under *United States v. Rabinowitz,* 339 U.S. 56, and earlier cases, because the arrest was illegal. This was so, appellant says, because the arrest either was not made under the warrant issued on January 26th, or if it was, then the warrant was void.

Taking these latter two points in reverse order, we shall consider first the contention that the warrant was void when the arrest was made. Appellant contends that a warrant [fol. 119] can be issued by the United States Commissioner, or judge, only upon a complaint sworn to by the prosecuting witness, stating the essential facts constituting the offense charged;[3] that the complaint here, fn. 2, *supra*, did not contain a statement of the essential facts; and that upon the taking of the testimony of the affiant it was apparent that the statements made by him were not within his personal knowledge, but must have been based upon information furnished by others.

The Government counters by saying that the allegation of receiving and concealing heroin hydrochloride with knowledge of unlawful importation was substantially in the words of the statute,[4] and that this was sufficient to state the crime of which appellant was charged. Further the Government says that so long as the complaint is sworn to positively and not on information and belief, it is immaterial on the question of validity of the warrant that the officer did not acquire his knowledge of the facts from personal observation. Finally the appellee takes the position that the preliminary hearing is the place to raise all questions as to the validity of the arrest, and a waiver of

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[3] This is in accord with Rule 3, Federal Rules of Criminal Procedure, which provides:

> "The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States."

[4] 21 U.S.C.A. §174.

such hearing makes such defense unavailable to the accused later in the trial.

In view of the fact that the ground for our decision makes unnecessary an inquiry into the questions whether the [fol. 120] arest was actually made on the warrant; whether the complaint contained an adequate statement of the essential facts; and whether the warrant was valid if issued without the personal knowledge of the affiant of the facts asserted, we go directly to the final point made by the Government.

When, as here, a person is arrested upon a warrant issued on a complaint he must be brought before the nearest United States Commissioner, without unreasonable delay.[5] It then becomes the duty of the Commissioner to inform the defendant of the charge and of his right to a preliminary hearing at which he can inquire into the probable cause of the arrest. If the defendant waives preliminary examination the Commissioner holds him forthwith to answer in the district court.[6]

Here appellant was represented by counsel at his commitment hearing, and, as authorized under the rules, he waived preliminary examination, a proceeding at which he would have had full opportunity to test out the sufficiency of the complaint and legality of the warrant and the legality of his arrest under in or the presence of probable cause if arrested without a valid warrant.

We are much persuaded by the language of the opinion in *United States v. Walker* (2 Cir.), 197 F 2d. 287; cert. denied 344 U.S. 877, where the court dealt with the three important points here at issue: Sufficiency of the complaint as to statement of essential facts; sufficiency of the complaint as to the personal knowledge of the offense; and [fol. 121] the waiver of defects in the complaint by waiving preliminary examination. There the court said:

> "The appellant contends that his arrest was illegal because (1) the complaint did not set forth 'the essential facts constituting the offense charged.' as required by Rule 3, F.R.Cr.P.; (2) the complaint did not set forth the source of the government agent's information.

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[5] Fed. Rules Cr. Proc., Rule 5(a), 18 U.S.C.A.

[6] Fed. Rules Cr. Proc. Rule 5(b)-(c).

Taking up these points seriatim, it appears that the complaint, printed in the margin, substantially follows the statutory language of the offense charges, 18 U.S. C.A. §2314. Since an indictment in the words of the statute may be sufficient, Carter v. United States, 10 Cir., 173 F. 2d 684, certiorari denied 337 U.S. 946, 69 S.Ct. 1503, 93, L.Ed. 1749, a complaint in the same form may likewise be; such is the case here. Point (2) seems to be answered by the fact that on its face the complaint appears to be based on personal knowledge of the complainant. See Rice v. Ames, 180 U.S. 371, 376, 21 S.Ct. 406, 45 L.Ed 577. When arraigned before the commissioner in Maryland the appellant could have challenged the complaint on the ground that the complainant did not have personal knowledge, but his waiver of examination and consent to removal would, in our opinion, preclude a later assertion that the complaint was not sustained by legally competent evidence. In our opinion the appellant has not established that his arrest was illegal."

United States v. Walker (2 Cir.), 197 F. 2d 287, at 289. To be sure the waiver in the Walker case was held by the court to apply only to the raising of the objection to the fact that the affiant did not have personal knowledge of the [fol. 122] facts alleged. We can see no basis for not applying the same rule to the other objection, the sufficiency of the statement of fact. Both are based on the same provision of the Fourth Amendment to the Constitution, and neither is less subject to waiver than the other. Nothing to the contrary appears in the opinion of Judge Augustus N. Hand in the district court case of *United States v. Ruroede* (S.D.N.Y.) 220 Fed. 210, 213. In that case there was no suggestion of the gist of the offense of which the defendant was charged, and the court properly held there would be no waiver, because the invalidity was plain on the face of the complaint and warrant. Here there is no such defect. There can be no serious contention made that Giordenello was not clearly apprised of the offense for which he was arrested.

We conclude therefore that if there were defects in the warrant and if the arest was made without proper warrant

or probable cause, which we discuss later but do not here decide, such defects could have been inquired into at the preliminary examination; that the waiver by appellant of the preliminary examination constituted a waiver of any such defects and he will not be permitted to raise the issues by motion later.

Much can be said moreover in support of the other points on which the Government relies to sustain the trial court's action.

As to the sufficiency of the statement of the offense, it is difficult to comprehend what more would be necessary to apprise Giordenello of the offense of which he was charged [fol. 123] than the language of the statute here used in the complaint. This is legally sufficient. *Brown v. United States*, 222 F. 2d. 293. The warrant would therefore not be invalid for this reason.

As to the objection that it must affirmativey appear that the officer made the complaint on his own personal knowledge, it has been held by the Supreme Court that if a complaint purports to be on the knowledge of the affiant this is sufficient to authorize the issuance of the warrant. *Rice* v. *Ames*, 180 U. S. 371; *United States* v. *Walker, supra;* and see the language of the Supreme Court in the recent case of *Costello* v. *United States*, 350 U.S. 359, where on page 353 the Court, speaking of the validity of an indictment based entirely on hearsay testimony said:

> "An indictment returned by a legally constituted and unbiased grand jury, *like an information drawn by the* prosecutor, if valid on its face, is enough to call for the trial of the charge on the merits. The Fifth Amendment requires nothing more." (Emphasis added.)

Moreover, it is difficult to see why a strict rule nullifying a complaint because based partially on the evidence of others can now be urged in the light of the Costello case in which the sole issue was whether an indictment based wholly on hearsay evidence was valid.

As to the delay in the use of the warrant, nothing has been cited to cause us to hold that, once armed with a warrant valid on its face, an officer is denied the right to execute it at a time when he can catch the accused "with the goods." [fol. 124]. There was evidence of reports coming to Finley

that caused him to believe Giordenello would obtain heroin from Chicago. He placed him under surveillance for weeks. Giordenello disappeared and later returned; he was driving an expensive automobile bearing an Illinois license; he drove to the place where he was arrested with a local suspicious character following him in another car bumper to bumper.[7] These facts would not have been sufficient to justify the use by Finley of the warrant solely as "an investigative technique," if by that it was meant that it was obtained not for the purpose of arresting Giordenello for the commission of the offense charged, but as an excuse to search him. Finley swore positively that such was not the case. Moreover, there was enough in the record to make it clear that an honest official might well have thought he was fully observing the legal restraints placed upon his actions, and that he had good cause for arrest even if the warrant already obtained was invalid since he believed he saw a felony being committed in his presence—a belief that subsequent events proved to be true.

We recite these facts in spite of our holding that the waiver was sufficient to meet the objections raised by appellant because it is clear from the record as a whole that no injustice is being worked on the accused by holding him to his waiver.

Many roadblocks to the swift visitation of punishment on even such criminals as purveyors of heroin are, and must [fol. 125] be, thrown up to assure a full measure of constitutional protection for the accused. That this sometimes makes difficult the apprehension and punishment of the guilty must be accepted as one of the prices we pay for constitutional government. There is a limit, however, beyond which the courts should not go. That limit, we think, has been reached when as in this case the person accused was accorded every opportunity to be informed of the nature and source of the charge against him, to test out the validity of his arrest and the strength of the Government's

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[7] While this evidence could not be admitted as proof of guilt, it was admissible to show the reasonableness of Finley's waiting and selecting the particular time and place to arrest Giordenello.

case in a preliminary hearing and, having waived these privileges, he still had the right to a jury trial on the merits.

We think the evidence was properly admitted by the trial court and the judgment is

Affirmed.

RIVES, *Circuit Judge, Dissenting:*

The arrest and search of the appellant were, I think, clearly contrary to the provisions of the Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be searched, and the persons or things to be seized."

[fol. 126] Courts are under a solemn, an almost sacred, duty to defend the Constitution, and should never succumb to the temptation to countenance a violation of that amendment in order to apprehend or punish one guilty of a crime.[1] Otherwise, ultimately the clear provisions of that section of our Bill of Rights will become no more than a dead memorial to a liberty so dearly bought by our ancestors, and so uselessly expended by later and softer generations.

"Uselessly expended" because, when officers are trained to understand the Fourth Amendment, it presents no real obstacle to efficient law enforcement, but simply requires the interposition of a neutral and detached magistrate be-

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[1] "The protection of the Fourth Amendment extends to all equally,—to those justly suspected or accused, as well as to the innocent." Agnello v. United States, 269 U.S. 20, 32; see also, United States v. Lefkowitz, 285 U.S. 452, 464; Worthington v. United States, 6th Cir., 166 F. 2d. 557, 562.

The statement just made in the body of the opinion is not intended to imply any belief or doubt on my part but that my brothers are trying to follow the Constitution just as sincerely as I am. To the contrary, I have complete confidence in their honesty, intellectual and otherwise.

tween a policeman or a zealous government enforcement agent and the right of privacy of an individual citizen.[2]

The explicit language of the Amendment itself leaves no doubt possible that it covers warrants of arrest as well as search warrants, and it has often been so held.[3]

[fol. 127] In the present case, the complaint of the narcotic agent upon which the warrant was issued (copied in footnote 2 to the main opinion) contained no more than the bare conclusions of the officer practically in the language of the statute. My brothers adopt the holding of the Second Circuit that,

> "Since an indictment in the words of the statute may be sufficient, Carter v. United States, 10 Cir., 173 F.2d 684, certiorari denied 377 U.S. 946, 69 S.Ct. 1503, 93 L.Ed. 1749, a complaint in the same form may likewise be; such is the case here." *United States* v. *Walker*, 2d Cir., 197 F.2d 287, 289.

With deference, I submit that that holding is a non-sequitur. The case cited by the Second Circuit in support of the holding, *Carter v. United States*, 10th Cir., 173 F.2d 684, passed upon the validity of an indictment as a *pleading*, and did not involve the validity of an arrest. It referred to the provision of the Sixth Amendment that, "In all criminal prosecutions, the accused shall enjoy the right * * * * * to be informed of the nature and cause of the accusation." As a matter of pleading, when the statute embodies all the elements of the crime, an indictment following substantially the wording of the statute meets the requirements of the Sixth Amendment, and, "If the defendants wanted more definite information, * * *, they could have obtained it by

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[2] Johnson v. United States, 333 U.S. 10, 13-14; Rent v. United States, 5th Cir., 209 F. 2d. 893, 898; Clay v. United States, No. 15,996, December 11, 1956, m/s.

[3] Ex parte Burford, 7 U.S. (3 Crouch) 448, 453; Albrecht v. United States, 273 U.S. 1, 5; McGrain v. Dougherty, 273 U.S. 135, 156; Go-Bart Co. v. United States, 282 U.S. 344, 357 De Hardit v. United States, 4th Cir., 224 F. 2d. 673, 677; Wrightson v. United States, D.C.Cir., 222 F. 2d. 556, 557; Worthington v. United States, 6th Cir., 166 F. 2d. 557, 562; United States v. Horton, W.D.Mich., 86 F.Supp. 92, 97.

requesting a bill of particulars." *United States v. De Brow*, 346 U.S. 374, 378; see, also, *Rosen v. United States*, 161 U.S. 29, 34.[4] The added "probable cause" requirement of the Fourth Amendment for the issuance of a war- [fol. 128] rant is rarely applied to indictments or informations, though occasionally bench warrants do issue upon them. In each such instance, however, the existence vel non of probable cause is not left to the arresting officer, but there is interposed the Grand Jury in the case of indictments, the United States Attorney in the case of informations, and in all cases the court before issuing the bench warrant. As said by Judge Prettyman in *Wrightson v. United States*, D.C.Cir., 222 F.2d 556, 558:

> "For a warrant to be issued upon a complaint probable cause must appear from the complaint, and, of course, probable cause is inherent in an indictment or information."

The "probable cause" requirement of the Fourth Amendment as a prerequisite to the issuance of a warrant is different and in some ways more stringent than the pleading or notice requirements of the Sixth Amendment.

A United States Commissioner acts in a judicial capacity and should issue a warrant only upon competent evidence. The facts, and not the complainant's conclusion from the facts, should have been before the commissioner. *Worthington v. United States*, 6th Cir., 166 F. 2d. 557, 565. What was said by the First Circuit in *Giles v. United States*, 284 Fed. 208, 214, is true here:

> "In this case, as no facts whatever were put before the commissioner, he was ousted from his judicial function, and remitted to a performance purely perfunctory. The prohibition agent was applicant, affiant, in effect the judge of the existence of probable cause, and the officer [fol. 129] serving the writ. This is a very dangerous amalgamation of powers."

See, also, *United States v. Ruroede*, S.D.N.Y., 220 Fed. 210, 212.

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[4] Appellant's first opportunity to apply for a bill of particulars came after his arrest and search had been effected.

Nowhere has the requirement been stated more clearly than by Judge Bryant in *United States v. Gokey*, S.D.N.Y., 32 F. 2d. 793, 794:

> "The commission of a crime must be shown by facts, positively stated before a commissioner has jurisdiction to issue a warrant of arrest. This protection is guaranteed to every person by the Constitution (Fourth Amendment) through the provision that 'no warrant shall issue, but upon probable cause, supported by oath or affirmation.' This safeguard of liberty has been jealously protected by all courts. And well it should be, for it would be intolerable to allow a warrant of arrest to be issued upon the opinions, conclusions, or suspicion of some person, unsupported by facts. The 'oath or affirmation' required is of facts, not opinions or conclusions. The complaint must be supported by proof, so that the magistrate may exercise his judgment or discretion in determining that an offense has been committed, and that there is probable cause to believe the accused guilty of the commission thereof."

If by simple rote in copying the language of the statute, and without any facts in support of his conclusions, the complaining officer could supply the "probable cause" required by the Fourth Amendment, then indeed has that [fol. 130] requirement become purely formal and ritualistic and utterly deficient as a real and genuine protection to the privacy of the individual for which it was intended.

"United States commissioners are inferior officers." *Go-Bart Co.* v. *United States*, 282 U.S. 344, 357. They have such authority only as is conferred upon them by valid statute or rule. Their authority to issue warrants of arrest is that prescribed by Rules 3 and 4(a), F.R.Crim. Proc.:

> "Rule 3. *The Complaint.*
>
> "The complaint is a written statement of *the essential facts constituting the offense charged.* It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States." (Emphasis supplied.)

"Rule 4. *Warrant or Summons upon Complaint.*

"(a) . . . *Issuance . . . If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it,* a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it." (Emphasis supplied.)

Thus, "probable cause" must appear "from the complaint" itself, and the "essential facts" must be stated in the complaint. In the safeguarding of such fundamental human rights, the rules wisely leave nothing to speculation nor to oral testimony as to what was before the commissioner.

[fol. 131] The officer testified positively that in arresting the appellant he was executing the arrest warrant.[5] Though examined at length by counsel for the appellant, and obviously evasive, he never would testify that he saw the accused commit any crime.[6]

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[5] "Q. And then you executed the warrant of arrest, did you, that you had obtained on the 26th day of January?.

"A. As he attempted to approach his Cadillac, yes, sir."

At another place he testified:

"Q. Did you have in your possession at that time to exhibit to the defendant a warrant of arrest?

"A. I did.

"Q. Did you execute the warrant of arrest?

"A. I did."

[6] "Q. Well, from the time of the investigation up until the time you arrested him, you, yourself, never did see him do anything wrong, did you?

"A. I wouldn't say that, no, sir. I couldn't answer no to that question.

"Q. I mean violate any of the U. S. laws.

"A. Well, that is a difficult question to answer. I wish you would rephrase it, or reword it, if you possibly can, so I can better understand it.

"Q. Well, it is not my attempt to trap you in any question. I say from the time the investigation began until the 27th or 26th day of January, you never saw Veto Gior-

[fol. 132] The claim that the arrest can be justified as one for a different offense made without a warrant was actually put forward not by the arresting officer, but by Government counsel, and is a distinct afterthought. The

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denello violate any of the laws of the United States of America, did you?

"A. Not that I am prepared to prove now, no, sir.

. . . . . .

"Q. You hadn't seen him violate any law at the time you swore out the first warrant on January 26th, had you?

"A. That is the same answer. I can't say no to that question.

"Q. But I am speaking of your own knowledge, Mr. Finley.

"A. Well, of my own knowledge I would say that the answer to your question is no, or rather it is undetermined. It is not no, and it is not yes, that I am prepared to prove or state now.

. . . . . .

"Q. Well, at the time you did arrest him on the 27th, you hadn't seen him violate the law before you served the warrant, had you?

"A. That is the same question again, Mr. Scott. I can't say whether I did or didn't at this time.

"Q. I will ask you the question this way; you went out in the vicinity of Lathrop and Brownsville Streets, didn't you?

"A. On the 27th day of January, 1956, yes, sir.

. . . . . .

"Q. Were you in an automobile there?

"A. Yes, sir.

"Q. Did you park your car?

"A. I did, sir.

"Q. Where?

"A. Just off of the intersection of Brownsville and

appellant was charged with the different and later offense for the first time in the indictment. No complaint was filed with the commissioner for any such offense as would have been required by Rule 5(a), F.R. Crim.Proc., had he been arrested therefor,[7] and appellant was committed simply for the offense for which the warrant was issued. On that earlier offense the arresting officer had had ample time to get a warrant, as is evidenced by his having in fact secured a void warrant based upon his own sheer conclusions. As said by Judge Brown for this Court in [fol. 133] the recent case of *Clay* v. *United States*, No. 15,996, December 11, 1956, m/s:

> "Finally, while the ease and practicability of obtaining the warrant of arrest or to search, Trupiano v. United States, 334 U.S. 699, 92 L.Ed. 1663, is no longer an invariable rule of thumb, United States v. Rabinowitz, 339 U.S. 56, 94 L.Ed. 653, availability of the safeguards afforded by an impartial, judicial magistrate is a factor bearing on reasonable, probable cause."

Lathrop. I believe it is the northeast corner of that intersection.

"Q. Did you see the defendant Veto Giordenello there?

"A. I did, yes, sir.

"Q. What was he doing?

"A. Well, he was doing several things during the time that I saw him.

"Q. What did you see him do prior to the time you—

"A. I saw him drive his 1955 Cadillac; I saw him get out of that Cadillac; I saw him go into an address at 6827 Brownsville Street; I saw him come out of that address; I saw him go into a garage; I saw him come out of the garage—

"Q. And then you executed the warrant of arrest, did you, that you had obtained on the 26th day of January?

"A. As he attempted to approach his Cadillac, yes, sir."

[7] Rule 5(a), F.R.Crim.Proc., provides in part:

"When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

See, also, *Shurman* v. *United States*, 5th Cir., 219 F. 2d 282; *Rent* v. *United States*, 5th Cir., 209 F. 2d 893.

Actually, it seems clear to me that the officer did not know, nor have probable cause to believe, that the appellant was committing a felony until he had arrested him, seized the paper sack from his hand, and searched that sack.[8] If the arrest had then been made for the different and later offense, it would come squarely within what was said by this Court in *Walker* v. *United States*, 225 F. 2d. 447, 450: "The arrest of appellant followed and did not precede the search and was based upon the result of the illegal search." The crime involved in *Walker* v. *United States*, *supra*, and that involved in *Johnson* v. *United States*, *supra*, upon which the Walker Case relied, come much nearer being committed in the presence of the officers than did the crime charged in this case.

My brothers hold, however, that the legality of appellant's arrest and search was effectively and finally con- [fol. 134] ceded because not objected to at the preliminary hearing and again they rely upon *United States* v. *Walker*, 2nd Cir., 197 F.2d 287. That case differs from this in many material respects.

In the first place it was not a direct appeal, as here, but was a collateral attack by motion under 28 U.S.C.A. 2255, and the Second Circuit commented that, "Such a motion cannot ordinarily be used in lieu of appeal to correct errors committed in the course of a trial, even though such errors relate to constitutional rights." 197 F. 2d. at p. 288.

Further in that case, the search was not incidental to an arrest, as here, but the defendant in that case, while under arrest for a different offense, had confessed the crime for which he was later indicted and convicted and had consented to a search of his trunks which produced the evidence used at the trial. The Second Circuit further commented:

> "The evidence obtained by search was found in the appellant's luggage which was in the possession of Mrs. Ashe, who consented to the search. As we stated

[8] The ninety-five papers or bindles containing a mixture of one ounce of heroin and five ounces of milk sugar were in a brown manila envelope inside the paper sack.

on the prior appeal, United States v. Walker, 2 Cir., 190 F. 2d. 481, 483, the appellant had no right to object to the search of premises not occupied by him nor to the seizure of property not within his possession." 197 F. 2d. at p. 289.

The most important distinction between that case and this is that there the Second Circuit did *not* hold that Walker's waiver of examination precluded him from thereafter objecting on the ground that the complaint upon [fol. 135] which the warrant was issued did not set forth the essential facts constituting the offense charged, but held to be waived that part of what the Second Circuit called point (2) objecting that the complainant did not have personal knowledge of the facts and had not sustained his complaint by legally competent evidence.[9] I quote the exact language of the Second Circuit:

"* * * When arraigned before the commissioner in Maryland the appellant could have challenged the complaint on the ground that the complainant did not have personal knowledge, but his waiver of examination and consent to removal would, in our opinion, preclude a later assertion that the complaint was not sustained by legally competent evidence.[6]

"6. See United States v. Ruroede, D.C.S.D.N.Y., 220 F. 210, 213, where Judge Augustus N. Hand said: 'His waiver will prevent him, as I have heretofore said, from objecting to informalities or irregularities in the warrant or in the complaint. * * * The prisoner has a right to have evidence produced in support of the complaint and to produce evidence on his part in answer thereto; in other words, to have the benefit of a preliminary examination. If he does not desire to have it and waives it, he cannot thereafter claim that he should have had it. In other words, the waiver is as broad as the privilege and nothing more.' Compare United States ex rel. King v. Gokey, D.C. N.D. N.Y., 32 F. 2d 793, 795."

[9] An objection regarded as a mere informality or irregularity as is evidenced by the quotation in the succeeding footnote 6 to that opinion, quoted infra.

[fol. 136] True, the Second Circuit had already held that the complaint in that case did set forth the essential facts constituting the offense charged, and, with deference, I have hereinbefore questioned the soundness of that holding. Whether sound or not, however, it was in effect a holding by the Second Circuit in that case that the complaint was sufficient to confer jurisdiction on the commissioner to issue the warrant. The distinction is made entirely clear, indeed obvious, if, instead of the extracts quoted from Judge Augustus N. Hand in footnote 6 to the Second Circuit's opinion, quoted *supra*, we read the entire paragraph of Judge Hand's opinion.

"It is urged, however, by the United States attorney, that, inasmuch as the prisoner at the hearing before the commissioner waived examination, he is debarred now from complaining of his confinement pending an investigation by the grand jury. There is no doubt that a waiver of examination does debar a prisoner from thereafter questioning informalities or technical objections to the regularity of the proceeding; but I do not think that any cases cited by the United States attorney have gone so far as to hold that a waiver of examination cured a complaint which upon its face discloses no facts indicating the commission of a crime. While the government in any case is justified as far as possible in keeping secret its evidence until a matter has been submitted to the grand jury, it cannot, I think, sustain a warrant of arrest for any reason or under any circumstances, where neither the warrant nor the complaint state facts constituting the crime that is charged, even though the prisoner has at the hearing waived examination. His waiver will [fol. 137] prevent him, as I have heretofore said, from objecting to informalities or irregularities in the warrant or in the complaint; but it does not, I think, debar him from attacking a process which does not upon its face state the facts which constitute the crime charged. The meaning of the waiver is, I think, simply this: The prisoner has a right to have evidence produced in support of the complaint and to produce evidence on his part in answer thereto; in other words,

to have the benefit of a preliminary examination. If he does not desire to have it and waives it, he cannot thereafter claim that he should have had it. In other words, the waiver is as broad as the privilege and nothing more. He has never by any conduct of his waived the right to object to the fact of being held upon a complaint which states no cause of action and upon a process which is, therefore, void." *United States* v. *Ruroede*, 220 Fed. 210, 213-214.

Again the distinction appears from the other case referred to in footnote 6 to the Second Circuit's opinion, *supra*, *United States ex rel. King* v. *Gokey*, D.C.N.D.N.Y. 32 F.2d. 793, 795, where Judge Bryant said:

"The fact that the records show that relator upon arraignment waived examination, and consented to await the action of the District Court, does not estop him from now questioning the legality or sufficiency of the complaint. A waiver of examination, if one is had, debars a prisoner from thereafter questioning informalities or technical objections to the regularity of the proceeding, but it does not, I think, deprive him of the right to attack a process insufficient to confer [fol. 138] jurisdiction. U.S. v. Ruroede (cited above); People ex rel. Perkins v. Moss, 187 N.Y. 410, 80 N.E. 383, 11 L.R.A. (N.S.) 528, 10 Ann. Cas. 309."

A somewhat similar question was presented to the Supreme Court in *Albrecht* v. *United States*, 273 U.S. 1, where the information filed by the United States Attorney, upon which a bench warrant issued, had not been verified by the United States Attorney but was supported only by the affidavits of witnesses sworn to before a notary public—a state official not authorized to administer oaths in federal criminal proceedings. Mr. Justice Brandeis, speaking for the Court, said:

"* * * A bench warrant issued; and the marshal executed it by arresting the defendants. When they were brought into court, each gave bond to appear and answer; was released from custody immediately; and was not thereafter in custody by virtue of the warrant or otherwise. At the time of giving the

bonds, no objection was made to either the jurisdiction or the service by execution of the warrant; and nothing was done then indicating an intention to enter a special appearance. * * *

"The bail bonds bound the defendants to 'be and appear' in court 'from day to day' and 'to answer and stand trial upon the information herein and to stand by and abide the orders and judgment of the Court in the premises.' It is urged there was a waiver by giving the bail bonds without making any objection. We are of the opinion that the failure to take the objection at that time did not waive the invalidity of the warrant or operate as a general appearance." 273 U.S. at pp. 4 and 9.

[fol. 139] Further on in that opinion, Mr. Justice Brandeis makes it clear that, if we assume the existence of competent evidence to prove probable cause, it would be utterly futile to demand a preliminary hearing in order to object to an illegal arrest. Commitment, or, if necessary, rearrest and ultimate commitment, would result from the preliminary hearing just the same.

No lawyer would dream (or so I think) that by failing to demand an apparently unnecessary preliminary hearing he had waived the right of his client when charged with a different offense to object to the legality of his original arrest and the search that followed. Instead of thus stretching conduct not so intended into a waiver, we should, I think, "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson* v. *Zerbst*, 304 U.S. 458, 464, quoted and approved in *Emspak* v. *United States*, 349 U.S. 190, 198, and relied on by this Circuit in *Ballantyne* v. *United States*, 237 F. 2d. 657, 665, 669.[10]

Being of the firm view that the warrant was invalid, the arrest illegal, and the search unauthorized, I respectfully dissent.

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[10] Further, "A rule of practice must not be allowed for any technical reason to prevail over a constitutional right." Gouled v. United States, 255 U.S. 298, 313; quoted and approved in Agnello v. United States, 269 U.S. 20, 34, 35.

[fol. 140] IN UNITED STATES COURT OF APPEALS

No. 16,065

VETO GIORDENELLO,

versus

UNITED STATES OF AMERICA

JUDGMENT—January 31, 1957

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

"Rives, Circuit Judge, dissenting."

[fol. 141] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Filed February 21, 1957

To the Honorable Court of Appeals for the Fifth Circuit:

Veto Giordenello, appellant named above, presents this petition for rehearing in the above entitled case and in support thereof respectfully shows:

[fol. 142] I

The Court erred in holding that appellant lost his constitutional rights in one case by waiving a preliminary hearing in another case for the following reasons:

A. The preliminary hearing itself is not final and no ruling which the Commissioner could have made in appellant's favor would prevent further charges against appellant based on the same evidence. *Collins v. Loisel*, 262 U.S. 426, 429; *United States v. Gray*, 87 F. Supp. 436, 437.

B. The effect of the principal opinion is to amend Rule 41, Federal Rules of Criminal Procedure, by adding a proviso that the District Court's power to rule on the evidence depends on the proceedings before "inferior officers" (*Go-Bart Co. v. United States*, 282 U.S. 34, 357) although, "The sole express authority for a pre-trial suppression of the evidence by any court other than a trial court is found in Rule 41e." *United States v. Klapholz*, 230 F. 2d. 494, 496.

II

The Court's dicta to the effect that Mr. Finley had probable cause to arrest appellant without a warrant is based on evidence not presented at the hearing on the motion to suppress and found only as a part in the record of trial in which appellant was denied the right to cross-examine the witness. See R. 77.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that [fol. 143] judgment of the District Court be, upon further consideration, reversed.

(S.) William F. Walsh, Esq., 1116 Capital Avenue, Houston 2, Texas. Clyde W. Woody, Esq., 303 Legal Arts Building, Houston 2, Texas.

CERTIFICATE

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

(S.) William F. Walsh, Esq.

Certificate of Service (omitted in printing).

[fols. 144-147] IN UNITED STATES COURT OF APPEALS

[Title omitted]

ORDER DENYING REHEARING—May 17, 1957

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

"Rives, Circuit Judge, dissenting."

[fol. 148] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 149] SUPREME COURT OF THE UNITED STATES
October Term 1957

No. 22 Misc.

[Title omitted]

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, AND GRANTING PETITION FOR WRIT OF CERTIORARI —October 14, 1957.

In petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 549 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1958